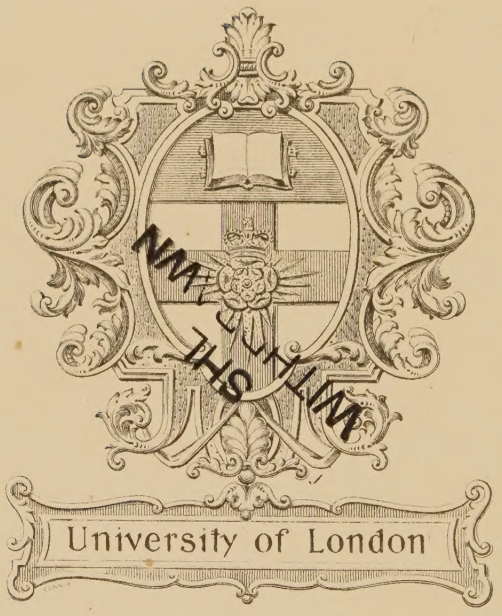
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THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

Affiliated to the British Institute of International Affairs

THE BRITISH YEAR BOOK OF INTERNATIONAL LAW

1922–23

THIRD YEAR OF ISSUE

LONDON
HENRY FROWDE AND HODDER & STOUGHTON
THE *LANCET* BUILDING
1 & 2, BEDFORD STREET, STRAND, LONDON, W.C. 2

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PRINTED 1922 IN GREAT BRITAIN BY R. CLAY AND SONS, LTD.,
BUNGAY, SUFFOLK.

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CONTRABAND

By the late SIR H. ERLE RICHARDS, K.C.S.I., K.C.,
Chichele Professor of International Law and Diplomacy in the University of Oxford. Member of the Institute of International Law

In a former volume of this Year Book [1] attention was called to the great increase of the powers of belligerents over neutral commerce which had ensued from the extension both of the lists of contraband goods and of the presumption of destination to the forces or Government of the enemy in the case of conditional contraband. But no apology is needed for a more close examination of these particular topics, even though it have to be made at the risk of some reiteration, because the practice of belligerents in the late war in regard to them is certain to be the subject of criticism at the next international conference on the laws of war at sea, and it is necessary for all of us to be in a position to form a judgment upon any controversy which may then arise. These particular extensions were enforced by all the belligerents so long as opportunity allowed, but when by the fortunes of war it came to pass that the Allies obtained command of the Atlantic traffic, at least so far as surface warfare was concerned, attention became necessarily focused on the proceedings in the Allied Prize Courts. The so-called blockade of the sea avenues to Europe to the north of Great Britain was no more than an exercise of the belligerent right of stopping contraband, with extensions by way of reprisals, with which for the moment we are not concerned. And the interruption to the commercial traffic of neutrals with the Central Powers must find its general justification in the same belligerent right. It is because the seizure of contraband was so extensive and because it had such an important effect on the fortunes of the war that the law on the subject has come into such prominence.

And it is to be observed at the outset that this stoppage of contraband proved to be the one great weapon left to belligerents at sea in the Great War. The only other right of interference

[1] Vol. I. (1920–21), p. 11.

with neutral trade is blockade, and blockade, as formulated in inter-State discussions from the time of the Armed Neutralities to the Declaration of London, could not be enforced against German ports by reason of the development of modern warfare.[1] Submarines, mines, and aircraft have rendered it too dangerous for a blockading squadron to keep their station within any defined and limited area as against a well-armed enemy. The law on this subject may have to be altered to meet these altered conditions, and it seems certain that the principle on which blockade, with its attendant belligerent rights, is founded would justify a larger area and a less definite position for the blockading fleet in view of these recent developments of warfare. But no extension of the rights of blockaders would have helped the Allies in regard to trade with Germany, for their interference with neutral trade going to Germany *via* neutral ports (and after the first few weeks practically the whole trade with Germany was forced to go by neutral routes if it went at all) could not be justified on that ground—at least in the opinion of the present writer. It would be contrary to all existing principle to admit a blockader's claim to interfere with traffic going to neutral ports, whatever its ultimate destination, or to declare a blockade of neutral coasts.[2] For this reason the Allies had to rely on the law of contraband, and the experience of the war has shown us that the right to stop contraband is, of itself, sufficient for all reasonable belligerent purposes. For the list of goods that can be properly stopped as contraband now covers the greater part of the trade with any enemy, while the destination of the ship to neutral ports or neutral shores is, by common admission, no longer a defence, if the ultimate destination of the cargo be hostile.

The great importance of the right to seize contraband is perhaps to some an unexpected result of our war experience. For in recent years it has been not uncommon, even in this country, dependent as she is for her safety on sea power, to advocate the abolition of the right, either altogether or in part. At the second Hague Conference in 1907, a motion for total abolition obtained the support of twenty-five of the Powers;

[1] There were a few instances of blockade in the old sense during the war. The coast of some portions of Africa, for instance, was notified to be under blockade. But these instances were unimportant and provoked no controversy.

[2] It is material on this point that during the early years of the war Great Britain elected to be bound by Art. 18 of the Declaration of London, under which blockading forces were prohibited from barring access to neutral ports or coasts.

at the London Conference the same proposal was commended to the sympathetic consideration of the British delegates by His Majesty's Government, and they were instructed, if the larger proposals failed, to agree to the abolition of the right to seize all but absolute contraband. These proposals were not carried. But it was agreed by the delegates at the London Conference that the doctrine of continuous voyage should not apply to conditional contraband; and if that had been ratified and had become binding on the Allies in the late war, there would have been no right to interfere with cargoes of foodstuffs on neutral ships going to Germany *via* neutral ports. Complaint has been made that Great Britain did not abide by the Declaration of London. It is true that the Declaration had received the approbation of the Government then in office, and it is equally true that the sovereign could have been advised by his ministers to ratify the treaty and could have ratified it forthwith. But that was not in fact done. The Declaration was a code of sea law agreed upon with the object of making possible appeals to an international prize court, and in order to provide for such appeals and to give effect to the decrees of the court in this country an Act of the Legislature was necessary. The ratification of the Declaration therefore was made to depend on the fate of the Bill to provide for these appeals, and though the Bill was passed by the House of Commons by a majority dividing on party lines, it was thrown out by the House of Lords. This rejection was an explicit announcement that the Legislature was opposed to the ratification of the Declaration, and was so understood by all. There can be no foundation therefore for the complaint that this country had gone back on any undertaking when war broke out; she had explicitly declined to be bound by the Declaration some years earlier. It is clear to us now that the various proposals to which reference has been made, and the Declaration of London itself, involved surrenders on our part of rights vital to the safety of this country. Indeed it is not going too far to say that if any one of the proposed changes had become law before August 1914, the fortunes of the war might well have been different. But the world has learnt from the experience of the war, and it is idle to expect now that Sea Powers will ever assent to the surrender of the right to interfere with traffic which directly assists the operations of their enemy. The question that remains and demands attention is therefore as to

the limitations which are imposed, or ought to be imposed, on the exercise of that right in the conditions of modern commerce and of modern warfare.

This point of the conditions of modern commerce and of modern warfare has always to be kept in mind, because international law as to warfare at sea, as understood in this country, rests so largely on the decisions of our Prize Courts in the French Wars a century ago. Those decisions do not depend only on the authority of Lord Stowell, however great that may be of itself, for the judgments of the Prize Courts of a belligerent cannot, without more, be treated as expositions of international law binding on other countries. Their authority, outside their own country, must be measured by the amount of acceptance they obtain from other States; and it is because the judgments of Lord Stowell have been accepted (with some important exceptions) by the Courts of the United States and of Japan that they take rank as leading pronouncements on Prize Law. But in applying them to claims in prize to-day, it must never be forgotten that they were delivered in conditions very different from those that now prevail. In so far as they lay down the principles on which the law rests, they stand with authority undiminished by any change; but in so far as they are concerned with the application of those principles to particular cases, they govern only in so far as the conditions to which they related were the same as those which prevail to-day. The alterations of the practice of merchants since Lord Stowell's day are material to the judgment of questions of contraband to-day; the alterations in the general trade of the world and in the methods of mercantile transport and mercantile finance are changes which must have a material bearing on the application of the law. These matters are common knowledge; yet they seem sometimes to slip out of sight. It is a truism to place on record the fact that in those days there were no other ships but sailing-vessels, that there were no railways, and no means of communication by cable or by wireless. And yet these factors are of the first importance in considering, for instance, the doctrine of continuous voyage. For in Lord Stowell's time the destination of the vessel might well be sufficient evidence of the destination of the cargo, since transport across land by road or canal was so insufficient as to be negligible in many cases. Nowadays the port of discharge is little or no evidence of the ultimate destination of the cargo, for goods can be unloaded and trans-

ported across a neutral State to a belligerent in a few days, if not in a few hours. And the same facility of communication has altered the whole practice of merchants. The purchase and the financing of a cargo on the other side of the Atlantic can now be effected in a day or less, and questions of enemy ownership and of infection depend to-day on different trade usages from those which prevailed at the time the judgments of Lord Stowell were delivered. In the same way, upon the ancillary questions of the right of visit and search, and of bringing in for examination, it is essential to remember that the ships with which the British Prize Court had to deal in the French Wars were mere skiffs compared to the great liners or even to the average merchant vessels of to-day. The prize vessels before Lord Stowell could seldom have exceeded 250 tons. The average size of British vessels employed in carrying the foreign and coasting trade of Great Britain itself during the French Wars was about 125 tons. Those trading between Great Britain and the United States from the year 1792 to 1800 averaged 200 to 230 tons; those on the West Indies and Baltic trade about 250 tons; on the Levant trade 250 to 300 tons, with some of 500 tons; the East India Company's ships averaged something short of 800 tons. And we may fairly assume that the merchant vessels of other Powers were of no greater tonnage than those of this country.[1] The examination of these small ships for contraband was a very different matter from that of the average merchant ships of to-day, and still more so of the big passenger liners of 30,000 to 50,000 tons each. The right of visit and search must necessarily be altered to meet these new conditions, and for similar reasons the practice of detention on suspicion as enforced in the late war seems to be equally outside the rules which Lord Stowell followed in allowing or disallowing compensation to successful claimants.

The increase in the kinds of materials essential to the manufacture of munitions of war is a change no less remarkable. The controversies of the eighteenth century as to the goods which could be declared absolute contraband for the most part raged round the question of adding timber and other naval stores to the armaments, saltpetre and sulphur, which were generally accepted as properly within the list. The requirements of munition makers were simple and limited : no chemicals for high explosives nor for gas, no materials for aeroplanes. There were

[1] Mahan, *Influence of Sea Power on the French Revolution*, Vol. II. p. 224.

no engines to be built for ships, and but little machinery. The right to stop neutral trade in goods *ancipitis usus*, as Grotius classified them, known to us now as conditional contraband, was not always admitted, and if insisted on was in some cases reduced to a claim of pre-emption. The liability to seizure of conditional contraband has since become well established, and was accepted at the London Conference, but the proof of warlike use, necessary for condemnation then, as it is now, presented little difficulty in those days—cheeses to a fleet fitting out in Brest, and so forth. Those were the simple cases of conditional contraband with which Lord Stowell had to deal. To-day the same issue has to be determined, but it is complicated by the fact that the majority of the adult population of belligerent nations, whether men or women, are either in arms or are assisting their country's operations in some way or other according to their abilities, and by the further fact that the Government of every belligerent country has powers, and in the late war exercised powers, to control imports. It is obviously more difficult in these conditions to draw the line between destination for purposes of war and destination for civilian populations.

On these two points, the first as to the extension of the lists of contraband goods, the second as to the presumption that cargoes of goods of the character of conditional contraband are going to the enemy country to be used for purposes of assisting in the conduct of the war, it has been said that both sides in the late war followed the same practice. Both claimed the right to determine for themselves the goods to be listed as contraband. Both, in effect, held that conditional contraband going to any port or place in the enemy country was to be presumed to be for use in the conduct of the war. Were these practices warranted by international law, and, if so, is any amendment of the law required in regard to either or both of them?

On the first point it is thought that the belligerents were well founded according to the principles of international law. They had a right to forbid trade in any article which directly assisted in the conduct of war, and the fact that changes in modern warfare, and particularly in the manufacture of munitions, had made most articles of commerce useful, and many essential, for the conduct of war, did not of itself place any limit on that right. The general principle on which the belligerent's right is based is stated by Hall in the following terms: "The privilege," he says,

" has never been denied to a belligerent of intercepting the access to his enemy of such commodities as are capable of being immediately used in the prosecution of hostilities against himself." [1] The principle thus expressed is generally accepted, and it justifies any such extension of contraband lists as may from time to time be found necessary to prevent the enemy from receiving consignments of goods to be used for the purposes of the war. To stop the manufacture of gunpowder in the French Wars of a century ago, it was enough to forbid the trade in sulphur and saltpetre; to-day the substances necessary for the manufacture of explosives are obtained from many and diverse sources. For instance, it was established by evidence in the Prize Court of this country that lard and other pig products, such as those known as " fatbacks," were being imported into Germany for the purpose of extracting from them glycerine, a substance in great demand for the manufacture of high explosives. Wines from Spain and consignments of animal horn have been proved to be used for similar manufactures. And it is not going too far to say that the discoveries of chemists have brought it to pass that a large percentage of the imports which are the subject of trade in time of peace have become essential, or at least useful, for warlike purposes.

It is submitted that this extension of the lists of contraband was clearly covered by the principle on which the right of interference rests. No belligerent can be compelled to lie to and permit a procession of ships to pass by carrying cargoes to the enemy which he knows will be used for warlike purposes. The law does not impose that restraint on him, and if it did it would be unreasonable.

The particular items which can properly be included in lists of contraband must depend to some extent on the particular circumstances of each war, but it seems certain that belligerents must have the right to determine those lists in the first instance. An attempt to enforce fixed lists of contraband, irrespective of any future advance in chemistry, was made at the London Conference; but the agreement there arrived at was found to be wholly impracticable, and was abandoned by every one of the belligerent Powers. The scheme of the Declaration of London was to have three lists : the first of articles which might be treated as absolute contraband, the second of articles which might be treated as conditional contraband, the third of articles

[1] *International Law*, Pt. IV. ch. v. § 236.

which could never be declared contraband at all. But these lists proved to be wholly inappropriate, and the war had not long been in progress before it was found that some articles in the third or free list were essential to the manufacture of munitions: raw cotton, rubber and metallic ores, for instance, were found to be of such importance in munition making that they were declared to be absolute contraband, although in 1909 it had been agreed that they should never be declared contraband at all. The Allies refused to be bound by the Declaration in this respect from the very first, and the Central Powers soon followed suit. This experience teaches us that it is impossible to have lists fixed in advance. There must be some elasticity to meet new developments. Article 23 of the Declaration did indeed give power to add to the specified list of absolute contraband, but this power was limited to articles exclusively used for war. This cannot be the right test. The fact that one of the main constituents of high explosives can also be used for commercial purposes is not enough to protect it from seizure as absolute contraband, if it be essential to the enemy operations. The question must surely be one of the relative importance of the military and of the commercial demand at the time, and by that test must be decided the placing of any given article on the absolute or on the conditional list. There seems no object in having a third list of exempted articles, for if any such list is to be final, whatever future developments there may be, then it must be confined to those kinds of goods which no belligerent could ever in any circumstances desire to interfere with, such as fashion and fancy goods (Art. 28 [15]), and it is not worth putting on paper. It follows, as has been said, that the lists must be drawn up by the belligerents. But neutrals have the right of checking any abuse in the undue extension of the lists by diplomatic remonstrance or by action if need be. The power of remonstrance has proved effective in the past. For example, in 1909 Great Britain and the United States remonstrated with Russia against the placing of all provisions on the list of absolute contraband, and as a result of that remonstrance the lists were modified and foodstuffs were made contraband only if going to the belligerent Government, its forces, fortresses or naval ports, or its purveyors. Here is a check applied with success. But in a world's war, when neutral opinion has ceased to be a real sanction and there

is no power to make it effective, this check becomes proportionally reduced, even if it operates at all.

We come then to the second point, the abolition in practice of the distinction between the general enemy destination sufficient to condemn goods of the character of absolute contraband and the special destination to the forces or Government of the enemy required in the case of conditional contraband. It will be remembered that this special destination was considered and defined in the Declaration of London, and that it was agreed that certain facts should *primâ facie* raise a presumption of this special destination. These presumptions were extended during the war both expressly and by the practice of the Prize Courts; but, so far as they went, the Articles of the Declaration seem to have been generally acted on as a sufficiently accurate statement of the then existing law—and that whether the Declaration was treated as binding or not. Article 33 in substance declared conditional contraband to be liable to capture if shown to be destined for the use of the armed forces or of a Government department of the enemy State, unless in this latter case the circumstances showed that the goods could not in fact be used for the purposes of the war. This destination was presumed to exist (though it could be expressly disproved) if the goods were consigned to the authorities, or to a fortified place, or other place serving as a base for the enemy forces. There were other facts from which the same presumptions were held to arise, which it is not necessary to set out for our present purpose. Now the effect of these two presumptions as enforced in practice by both sides was to abolish the special protection given to conditional contraband, to reduce it to the same position as absolute contraband, and make it subject to condemnation if a general destination to the enemy country was established. The German Prize Courts, in effect, condemned cargoes going to any port in the British Isles, because in every case they had before them a certificate from the Chief of the German General Staff, or of the Admiralty Staff, that that particular port in question was a military base. The ports of Ipswich, Poole, Borrowstone, Grangemouth, London, Dublin and Belfast, for instance, were all held to be military bases. The case of the *Maria*, decided by the Imperial German Supreme Prize Court [1]

[1] The full reports of German Prize Cases are not yet readily obtainable in this country, but translations of some of them have appeared in English journals. The *Maria* is reported in the *American Journal of International Law* (1916), Vol. X. p. 927,

at Berlin on October 5, 1915, may be taken as an illustration of the practice of the Court. There the cargo consisted of wheat in sacks going part to Belfast, part to Dublin. Both these places were held to be military bases on the evidence of a communication from the Chief of the General Staff of the Navy. And the case of the Netherland s.s. *Batavier V*, decided by the same Court on May 5, 1916, confirming previous decisions, shows that the difficulty of rebutting the presumption of use by the belligerent forces of the country of destination is practically insuperable. On the British side the general result was the same. The Court had but seldom to deal with direct consignments to particular enemy ports, for the trade went through neutral ports with no particular enemy destination specified, but, so far as consignments to German ports were concerned, the Court treated them in much the same way as the German Courts. And indeed this is likely to be always so; for Prize Courts must in practice accept the information of their own Government, and it is almost impossible for claimants to disprove a statement that supplies are being drawn by the enemy Government from any particular port. But in regard to supplies consigned to neutral merchants with a general destination to Germany established, the same result was reached in another way. As early as February 20, 1915, the British Foreign Secretary, in a despatch to the Government of the United States, argued that the distinction between the civil population and the armed forces of Germany had disappeared. He said :—

"The reason for drawing a distinction between foodstuffs intended for the civil population and those for the armed forces or enemy Government disappears when the distinction between the civil population and the armed forces itself disappears. In any country in which there exists such a tremendous organisation for war as now obtains in Germany, there is no clear division between those whom the Government is responsible for feeding and those whom it is not. Experience shows that the power to requisition will be used to the fullest extent in order to make sure that the wants of the military are supplied, and however much goods may be imported for civil use it is by the military they will be consumed if military exigencies require it, especially now that the German Government have taken control of all the foodstuffs of the country. In the peculiar circumstances of the present struggle, where the forces of the enemy comprise so large a proportion of the population and where there is so little evidence of shipments on private as distinguished from Government account, it is most reasonable that the burden of proof should rest upon the claimants."

And the late President, Sir Samuel Evans, pointed out that apart from any other proof, even assuming that the goods in question before him were indiscriminately distributed between the military and civilian population, a very large proportion would necessarily be used by the military forces.[1]

The right of requisition is one with which most Governments are invested or which they will take powers to exercise as soon as the necessity arises; and Germany not only had the power, but exercised it under various specific decrees in regard to particular classes of articles. And in that way destination to the enemy Government or forces was held to be established. Indeed, on April 13, 1916, a Parliamentary Paper [2] was issued giving a list of goods then contraband, in which the distinction between the two classes is omitted of set purpose :—

"This list comprises the articles which have been declared to be absolute contraband, as well as those which have been declared to be conditional contraband. The circumstances of the present war are so peculiar that His Majesty's Government consider that for any practical purposes the distinction between the two classes of contraband has ceased to be of any value. So large a proportion of the inhabitants of the enemy country are taking part, directly or indirectly, in the war, that no real distinction can now be drawn between the armed forces and the civilian population. Similarly, the enemy Government has taken control, by a series of decrees and orders, of practically all the articles in the list of conditional contraband, so that they are now available for Government use. So long as these exceptional conditions continue, our belligerent rights with respect to the two kinds of contraband are the same, and our treatment of them must be identical."

This declaration did not and could not affect the action of the Prize Court; it was in law no more than the view of the Secretary of State for Foreign Affairs, or of the Executive; and the Orders in Council authorising lists of contraband preserved to the last the distinction between absolute and conditional. But that mattered not, for in the Prize Court, once a general destination to Germany was established, it was difficult, if not impossible, to get an order for release on the mere ground that the special destination to the enemy Government or forces was not established.

And so it came to pass in these two ways that the Allies were able to claim and to enforce an interference with neutral commerce which came near to being a prevention of all trade with

[1] See the *Kim*, 1 Br. C.P.C. 405, at 486.
[2] Misc. No. 12 (1916) [Cd. 8226].

their enemies. And this, not because of reprisals, or of any other exceptional measures, but because this interference was justified according to the existing law of contraband. The extension of the lists of contraband followed necessarily, according to law, from the extension of the demands of those who controlled enemy hostilities. The general presumption of destination to the Government of the country to which the goods were consigned, followed necessarily according to law from the control over imports assumed by the enemy Government, and from the difficulty, if not the impossibility, of distinguishing between enemy combatants (and this includes those assisting in some way or other in war work) and the comparatively lesser part of the enemy population who took no part in assisting the conduct of the war. Indeed the arguments used by the British Foreign Secretary in the passage cited cannot be confined in their application to Germany. They apply to all belligerent countries in a great war, and could have been urged with equal force by Germany in dealing with British cargoes. We know from history that the rights of belligerents in this matter of interference with neutral trade are the result of compromise, and that in recent years the tendency has been in favour of greater protection for neutral shipowners and neutral traders. But the progress of events has been strong in the opposite direction, and the increase in belligerent rights has been brought about by inexorable fact, and not by any new departure in law.

The question then that seems likely to be raised at the next conference is whether the law should be amended in order to give further protection to neutral trade on either of the points under discussion. There can be no abandonment of the right to seize contraband—that is not within the range of practical politics at the present time—nor can there be any abandonment of the right to seize conditional contraband if going for war uses, and for the same reason, that the naval Powers would never assent to either proposal in the light of recent experience. A majority of States, even if there were a majority, could not enforce a change of such a revolutionary character on an unwilling minority. Moreover, as we all know, it is useless for the law to prescribe impossibilities, and it is impossible that a belligerent, who had won control of the sea, would allow his fleet to lie inactive while ship after ship passed by carrying munitions or other cargo to the forces of the enemy. Such a

law, if enacted, would assuredly be evaded or avoided in every war. But short of the total abolition of this belligerent right, is it possible to impose any effective limitations on the exercise of it?

So far as the extension of the lists of contraband is concerned, it seems difficult to take objection in a Prize Court to the inclusion of any particular item on those lists with any success, save in extreme cases. A consignment of artificial flowers, or scent, or dancing shoes, would no doubt be rejected, even though it were shown they were destined for the use of lady munition makers. Things such as these are not necessary for the conduct of war, and ought not to be included in any list of contraband. But in cases in which necessity is plausible, a Prize Court would have to act, as in other like cases, on the information put before it by the Executive, and it would be seldom if ever possible for a claimant to disprove that evidence and establish a negative. The initial remedy must be found, not in the Prize Court of the belligerent, but in diplomatic remonstrance, and it has been shown that in any war in which neutral opinion operates as a real sanction this check is sufficient. But international law can never be free from reproach if it fails to provide a remedy for small nations who cannot enforce their rights by action, a state of things which can occur only in a world's war, for in other wars there will be many neutrals. It may be, of course, that in future there will be no neutrals at all, and that every State will be a belligerent on the one side or the other. That is a conclusion foretold by some learned persons, and if it be justified by experience, then it will be unnecessary to trouble about the law of contraband. But changes, especially radical changes, come slowly, and it is better to make provision for war as unhappily it exists to-day. What then can be done to give greater protection to neutrals in this matter of the lists of contraband in a world's war, when their good opinion has ceased to be an effective force? It has been recently suggested that the lists of contraband should require the sanction of some council or body representing the neutral Powers. But that is a change in the law which is not likely to meet with acceptance, and more particularly because belligerents alone know the needs of their enemies, and the necessity of proving those needs before any such council would entail a delay which no belligerent could be expected to suffer. Moreover, any such body would be an

ex parte tribunal, for it is always in the interests of neutrals to confine interference with trade to the minimum. If the dispute cannot be settled by agreement, and has to be determined judicially, then it should be referred to some impartial *forum* if such can be found. And here, as in other disputes, it would seem better, in the absence of international agreement, to bring the matter before an international tribunal or a court of arbitration after the war is ended. It must always be difficult to create a judicial atmosphere so long as the smoke of battle obscures the stage, nor is delay in general of importance in matters such as this, for if wrong is found to have been done, compensation is an adequate and appropriate form of relief. If the right to seize contraband is to continue, and if it is not possible to prescribe in advance any specific lists of contraband, or to allow an international body to settle the lists during hostilities (and reasons have been already stated which, in the opinion of the present writer, make any of these courses impossible), then diplomatic remonstrance and compensation after war seem the only practicable remedies.

The point as to the proof of special destination in the case of conditional contraband stands on a different footing, because the presumptions which have been used to establish that destination, if not new in themselves, have at any rate been extended beyond all former practice. If goods on their way to an enemy port, or indeed to any inland town of the enemy, are to be presumed to be for the enemy forces or enemy Government because they may be taken for such use by that Government, then the special destination is no more than a paper protection; and one may well question whether a legal distinction is worth maintaining in theory which disappears the moment it is applied to particular cases. The difficulty springs largely from the fact that the distinction between the combatant and the non-combatant portions of a belligerent population is no longer clear, if indeed it is any longer ascertainable. The whole nation in a great war such as that through which we have just passed is in arms, in the sense that every adult subject of either sex is working for some war purpose, if not disqualified by age or health or not engaged in civilian business which must be kept running. This development is new, and makes it very difficult to maintain the distinction on which the law on some points has hitherto been based. It is a complex matter, and affects

other questions besides those under our immediate discussion. It will be material, for instance, in determining the limitation on attacks by sea and air on enemy towns and villages, for it may at least be argued that munition workers can claim no greater protection from hostile attack than active combatants. The right to requisition imports on which some of these presumptions are based is not exercised solely for the supply of combatant forces: a belligerent Government is responsible for the supplies of all inhabitants of the country, and will control imports for that purpose just as much as for the purpose of supplying the forces. Indeed, the food of those not enrolled in the fighting forces will in general be the more important object for political and other reasons. And behind all these considerations there is this one further but fundamental: it is that in these days of quick facilities of transport every import of goods within the lists of conditional contraband must sooner or later assist the military operations of the belligerent country which they reach. For if imports be not used directly for the forces or for war workers, they must relieve other stores which without them would have been used for non-combatants, and so in effect must assist the conduct of hostilities. We have got a long way from the simple case of the consignment of provisions adapted and required for use on board ship to a port in which an enemy fleet is victualling, to which reference has been made, and here again the change has been produced by change in conditions, and not by any new construction of the law. The question is whether the law should be amended. On the one side, it is to be said that the distinction between the two forms of contraband has ceased to operate, and that it is idle to maintain in theory a distinction which cannot be applied in practice. On the other hand, it is to be said that the law must still draw such line as it can between combatants and non-combatants; for it cannot allow civilians, even if engaged in war work, to be subject to the forms of attack which may lawfully be employed against combatants: gas, air raids, bombardment of open towns, and the like; and if so, that the supply of food to civilians must equally be protected so far as that can be done. The whole matter demands and deserves the closest consideration, and it would be premature to express any opinion upon it until the evidence is before us of those who have had the actual conduct of hostilities, and until there has been the fullest discussion.

It has been the purpose of the present article to call attention to some general aspects of these two points of the law of contraband, in the hope of facilitating, if only in some small degree, the future consideration of them.

This final observation remains. The new conditions which have brought into being these new developments of international law have been the outcome of a world's war : that is, of a contest in which all the most powerful nations were engaged on the one side or the other, and in which, therefore, the force of neutral opinion was reduced to the lowest point. And, by reason of the fortunes of war and the geographical position of their enemies on the continent, it happened that the question of supplies by sea to the Central Powers assumed an importance beyond normal expectation. It may well be thought that the law of contraband as it stands to-day will be found appropriate to deal with neutral trade in other less extensive wars, if unhappily other wars there be. And if that be so, the argument for change loses proportionately in force.

THE LATE SIR HENRY ERLE RICHARDS, K.C.S.I., K.C.

My long friendship with Sir Erle Richards must be my apology for endeavouring to put on record some appreciation of the man and his work.

My intimate association with him began when, as Law Officer, I was fortunate enough to secure his assistance in dealing with the multifarious legal questions which come before the legal advisers of the Crown. He was well known as an able and accomplished member of the Oxford Circuit, but had not devoted any special attention to Public Law. He threw himself with his whole heart into this new class of work, and gave one more illustration of the wholesome rule that in looking for help it is much better to be guided by your opinion of a man's general abilities than by his special familiarity with the class of subject which may be expected to come up for consideration. A very distinguished statesman once said to me : " Believe me, there is no more unsafe guide than a man with special knowledge." After all, the primary question is always the qualities of the man himself. If he is the right sort of man he will soon familiarise himself with the problems presented by a new field.

The invaluable assistance which Richards gave me more than vindicated the advice I had received as to his capacity.

Richards had a specially clear mind and almost intuitively saw the essential points of a case, while his unfailing industry always ensured that he had present to his mind all the premises necessary for forming a sound conclusion. It was a pleasure to talk over any case with him, and it was chiefly in conversation with him that I reaped the harvest of his labours. He was able to give a short and lucid account of the problem which had to be solved, and of all the circumstances material to be considered, and he was able ruthlessly to eliminate the immaterial details with which a case is so often encumbered.

The chambers of the Law Officer afford no bad training for a Professorship in International Law. You there come into contact with the living realities of the situation, and points which seem dull enough in abstract treatises are full of life and interest when they emerge as a subject of actual controversy between nations.

In 1903 it was my good fortune to have his assistance as a colleague on the arbitration at The Hague as to the claims against Venezuela by a number of other nations and their subjects. It would be impossible to speak too strongly of the value of that assistance. When he was satisfied that his point was a good one he never rested until all those whom it might concern were able to appreciate its bearings as clearly as he did himself.

I think that sometimes there is an inadequate appreciation of the value of the conversational method as a preparation for the conduct of a case in court, whether it be international or municipal. It is an educational process of the most effective kind. I was early habituated to it when I myself worked in the chambers of my friend, the late Mr. Justice Day, then Mr. Day of the Home Circuit, whose name will go down to posterity as the author of the standard edition of the Common Law Procedure Acts. He was a very busy Junior, but when not actually engaged in court or in consultation he spent all his time in the pupils' room, discussing with his pupils all the cases in chambers, and, in effect, carrying on legal education in the most efficient of all possible ways—by oral discussion. With Richards I repeated the experience which I had with my old tutor, Day, and benefited greatly by the process in both cases.

In the Venezuelan claims case Mr. Arthur Cohen, K.C., was

associated with Richards and myself as counsel. I remember well how one day at The Hague he spoke to me strongly about the value of the work which Richards was doing. Cohen was himself then counsel to the India Office, and he said to me that he thought they could not have a better Legal Member of the India Council than Richards. Cohen's recommendation to the India Office was effective, and Richards was appointed Legal Member of the Viceroy's Council in 1904. He held that office for five years, I believe with great distinction.

On his return to this country he became one of the counsel in the very important and complicated arbitration as to the North Atlantic Coast Fisheries and various questions which had arisen between the United States on the one hand and Canada and Newfoundland on the other. We spent three or four months together at The Hague on that arbitration, and I have always attributed the highly successful result very largely to the help which Richards was able to give in unravelling the very complicated facts and in eliminating what was immaterial in the vast mass of matter presented to the Tribunal.

In 1911 he became Chichele Professor of International Law at Oxford. His contributions to the literature of international law were many and varied. He inaugurated his duties as Professor by a most able and interesting lecture on the Progress of International Law and Arbitration. He followed all the new developments of international law and was one of the first and ablest exponents of sound views as to the " Sovereignty of the Air " as affected by aviation. He reviewed the work of the British Prize Courts during the war, and wrote an article on the Jurisdiction of the Permanent Court of International Justice at The Hague, which was published in a former number of this Year Book, and is an admirable example of his style and method.[1]

[1] It may be mentioned that Sir Erle Richards was one of the three jurists nominated by the British Government for selection as the British Representative on the Permanent Court of International Justice at the Hague, the others being Viscount Finlay, who was chosen, and Lord Phillimore.

For the interest which the late Chichele Professor took in this Year Book we cannot be sufficiently grateful. He was an active member of the Editorial Committee from the beginning, and he contributed an article to each number (" The British Prize Courts and the War " in Vol. I. (1920–21), p. 11, and " The Jurisdiction of the Permanent Court of International Justice " in Vol. II. (1921–22), p. 1). The article on " Contraband " in this issue is actually his last work in life, being completed shortly before his death.—EDITORIAL COMMITTEE.

He wrote on various problems raised in the course of the Great War. One of his most striking efforts was his lecture in 1915, entitled "Does International Law Exist?" This title was suggested by the outrages perpetrated by the Germans in the course of that war. I may allow myself to quote one passage from that lecture, which I quoted on a former occasion in 1919 when addressing the Canadian Bar Association at Winnipeg, and I quote it again because I think it touches a point which should never be forgotten by any one interested in the mitigation of the horrors of war :—

> "If the indiscriminate murder of the civil population and the general destruction of civil property is to continue, then in future wars we should have every belligerent equipped with a fleet of airships, and the inhabited portions of every enemy territory will be ravaged by bombs dropped from the clouds. The aim of the laws of war has been to alleviate as much as possible the calamities of war and to confine the military operations of belligerents to the weakening of the military forces of the enemy: to spare non-combatants in the interests of humanity. But this kind of warfare is a complete reversal of that policy."

It is deeply to be regretted that he has left us no work embodying in more permanent form his conception of international law. Such a work he had, I know, projected, but I fear that he cannot have proceeded far with its execution.

On his return from India he commenced to practise in Indian appeals before the Privy Council, and he acquired a very substantial share of business, appearing in many of the most important appeals until the time, about a year before his death, when ill health compelled him to retire from active practice. He also had a large amount of Prize work, as some of his best arguments were delivered either before the Prize Court or on appeals to the Privy Council. The close contact which he was thus able to maintain with the practical daily work of his profession must, I am sure, have been of immense value to him in his teaching work. He was able to bring to Oxford the breath of practical reality which blows in the Temple and the Courts.

It is with melancholy interest that one remembers that in 1915 Richards published, in the *Journal of the Society of Comparative Legislation*, "A Memoir of the Rt. Hon. Arthur Cohen, K.C." It is now the duty of others to appreciate, however inadequately, the work of Richards himself. A host of friends

mourn his death. He was in society one of the most delightful men I ever met.

His learning in international law was real and solid, but of that learning he was always the master, never the slave. No man was ever more perfectly free from pedantry. His learning was controlled and leavened by a wide, genial and humorous outlook upon human affairs. His conversation was admirable, and his shrewd and trenchant comments upon men and things lost nothing—perhaps they gained—from the slow and rather languid manner in which they were delivered. He showed his prowess in games by winning School Fives at Eton, and I have been told on the authority of those thoroughly qualified to judge that he excelled in sport, particularly shooting, and was in every respect a model of what a sportsman should wish to be. This is well worthy of emphasis, for it was in part at least the key to that broad and tolerant view of men and affairs which was his most abiding characteristic. His death is in my view an irreparable loss to international law. Of the loss to his friends, though I am myself a friend of so many years standing, I feel I dare not speak.

FINLAY.

THE INTERNATIONAL STATUS OF THE BRITISH SELF-GOVERNING DOMINIONS

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The flexibility of the British Constitution has been manifested in a remarkable manner in the development of Dominion status. In that development, as in other branches of constitutional law, empiricism has played a greater part than logic; changes based on practical necessities have been made to meet the political needs of a progressive Empire, with so little regard for logical symmetry that there is some excuse for a superficial foreign observer adopting the attitude of Napoleon and declaring that " England has no constitution, she has only institutions."

The earlier stages of the evolution of Dominion status were confined to the acquisition of autonomy within the Empire, and were, therefore, of interest chiefly from the point of view of constitutional law, but when the Dominions began to assert—and to assert successfully—claims to an international personality distinct from that of the Empire as a whole their activities became the concern of international lawyers. But an appreciation of the present international status of the British Dominions is impossible without a historical background, and it is, therefore, proposed to trace historically the development of Dominion autonomy. For this purpose it is convenient to treat the subject under three heads: the position before 1914, developments between 1914 and 1918, and the present position.

The Position before 1914.

A new era in the relations between the Colonies and the home country began with the introduction of responsible government in certain Colonies. This movement, which had its birthplace in Canada between 1840 and 1850 was subsequently extended to Australia, New Zealand, Newfoundland and South Africa. Before 1840, although Colonial legislatures were in

existence, executive power in the Colonies was vested in the Governor appointed by the Crown, assisted by an Executive Council chosen by him and responsible to him and not to the elected legislature. Collisions between the executive and legislature were frequent, and, in practice, continual minority government was involved. But the grant of responsible government effected a complete change and the Colonies concerned acquired in their internal affairs an autonomy which was intensified as a result of the subsequent federalising movements in Canada, Australia and South Africa. Nevertheless, the Imperial Government did not surrender all control over Colonial affairs, and to appreciate the precise status of the Colonies before 1914 it is necessary to mention the restrictions under which they were placed in respect of legislation, of judicial appeals, and of executive action in foreign affairs. In respect of legislation the governing statute is the Colonial Laws Validity Act,[1] 1865, the effect of which is to retain in the hands of the Imperial Parliament the legal power to legislate for the whole Empire and to avoid any Colonial legislation which might conflict with such power. The inability of the Colonies to pass laws with extra-territorial operation is a definitely established principle,[2] and this has necessitated activity on the part of the Imperial Parliament either in legislating directly for the whole Empire, or else in coming to the aid of the Colonial legislatures; amongst other topics which have called for such activity may be mentioned extradition, foreign enlistment, merchant shipping, copyright, bankruptcy and naturalisation. But, apart from such necessary cases, the Imperial Government has shown an increasing disinclination to interfere with Dominion legislative autonomy, and Professor Dicey describing the position in 1914 says :—

" The power of the Crown, *i. e.* of the British Ministry to veto or disallow in any way any Bill passed by the legislature of a Dominion, *e. g.* New Zealand, is now most sparingly exercised, and will hardly be used unless the Bill directly interferes with Imperial interests or is as regards the Colonial legislature *ultra vires*. Thus the Crown, or in other words a British Ministry, will now not veto or disallow any Bill passed by the legislature of a Dominion on the ground that such a Bill is indirectly opposed to the interests of the United Kingdom, or contradicts legal principles generally upheld in England, *e. g.* the principle of free trade." [3]

[1] 28 and 29 Vict. c. 63.

[2] *McLeod* v. *Attorney-General for New South Wales* (1891), A.C. 455.

[3] Dicey, *Law of the Constitution*, 8th ed., Introduction, p. xxx.

Dominion autonomy is further restricted by the existence of the Judicial Committee of the Privy Council which has power to admit appeals from any Court in the Dominions whether or not the Court is a Court of Error. In the case of Canada, Australia and South Africa certain limitations on the appellate jurisdiction of the Judicial Committee are imposed by the Canadian Statute, 34 Vict. c. 11, the Commonwealth of Australia Act, 1900, and the South Africa Act, 1909, respectively, but in spite of these limitations the duties of the Privy Council are of importance in preserving uniformity of law as to the prerogatives of the Crown, and in maintaining the overriding force of Imperial statutes, although it is obviously incapable of securing general uniformity of law.[1]

But from the point of view of international law, it is the restrictions imposed on the autonomy of the Dominions in the matter of foreign policy that are of greatest importance. The original policy of the Imperial Government was to maintain complete control over all foreign relations of the Empire whether in respect of treaties or otherwise. Nor is this surprising when it is remembered that the Imperial Government incurred responsibility in the eyes of foreign Powers for any international delinquency committed by any part of the Empire. For this reason the self-governing Colonies were during the greater part of the nineteenth century debarred from individual action and direct dealings with foreign states. But considerable inroads had been made into this policy of centralisation before 1914, and the position of the Dominions with respect to foreign affairs in 1914 may be summarised as follows :—

(1) Over foreign relations of a purely political nature the Imperial Government retained an exclusive control. All treaties were made by the Crown on the advice of the Imperial Ministry, and there is no doubt that such treaties were binding on the Dominions whether or not their Governments consented to them. In some cases, the Imperial Government inserted a clause giving the Dominions the power of separate adherence to a treaty concluded by the Crown with a foreign Power, but this method was not always adopted even in comparatively recent treaties concerned with alliance, guarantee of territory, and regulations

[1] For a detailed account of the question of appeals from Dominion Courts to the Judicial Committee see Keith, *Responsible Government in the Dominions*, pp. 1357–1385, and *Imperial Unity*, pp. 366–388.

concerning the laws of war. Thus the Hague Conventions of 1899 and 1907, the treaty with France of 1904, the General Act of Algeciras regarding Morocco in 1906, and the Declaration of London, 1909, were all signed by Imperial Ministers for the Empire as a whole, and the Dominions were not given the power of separate adherence to them. The failure to consult the Dominions in the case of the Hague Conventions and the Declaration of London drew from the representative of the Commonwealth of Australia at the Imperial Conference in 1911 a formal motion regretting the omission, and it was therefore agreed that consultation should be arranged before the next of such Conferences.[1]

But while the treaty-making power lies in the Crown, the co-operation of the Imperial or Colonial legislatiures is necessary to make a treaty operative where its effect would be to alter the law of the land or to affect the rights and duties of British subjects. Sir William Anson points out that this seems "to follow from the general principles of the constitution,"[2] and Sir Robert Phillimore in giving judgment in the case of the *Parlement Belge*[3] held that the making of such a treaty without Parliamentary concurrence was "a user of the treaty-making power of the Crown without precedent, and in principle contrary to the law of the constitution." His judgment was subsequently reversed by the Court of Appeal, but on other grounds. Moreover, the practice of successive governments confirms the view that legislative sanction is necessary to give effect to a treaty which alters the law or modifies the rights and duties of private persons. This means that for such a treaty to become operative in a Dominion there must either be legislation by the Imperial Parliament making provision for the whole Empire, or in the absence of Imperial legislation, the Dominion Parliament must pass the necessary statute. But other classes of treaties become binding on the Dominions without their consent.

Imperial control over the foreign relations of the Empire was not confined to the treaty-making power; attempts on the part of the Dominions to intervene on their own initiative in international politics were discouraged if not repressed. Perhaps the most striking instance of such attempted individual action

[1] *Parl. Papers* [Cd. 5745], 97–132.
[2] *Law and Custom of the Constitution*, Vol. II. Part II. 103.
[3] (1879) 4 P.D. 154. Cf. *Walker* v. *Baird* (1892), A.C. 491.

was afforded in 1883. In that year Australia and New Zealand were deeply exercised over the position of the islands of the Western Pacific in view of the activity displayed by certain foreign Powers in that quarter. Queensland asked the Imperial Government to annex New Guinea in order to forestall the suspected action of Germany; but the request was refused. Queensland, therefore, on its own responsibility took steps to annex the greater part of New Guinea together with the islands of New Britain and New Ireland. This Act was repudiated by the Imperial Government, who had been assured that Germany had no designs on the island. In 1884 Germany annexed a portion of New Guinea together with the two smaller islands, and the Imperial Government then annexed the remaining portion of New Guinea.[1] In the same year the New Zealand Parliament passed a Bill authorising the New Zealand Government to annex any island in the Pacific not claimed by foreign Powers; the Bill was vetoed by the Crown.

Moreover, the determination of questions of peace and war rested with the Imperial Government, who could take action without obtaining the assent of the Imperial Parliament or of the Parliaments of the Dominions. As a principle of constitutional law this was not open to controversy and the Dominions recognised that they might become involved in a war about which they had not been consulted. At the same time, as Sir Wilfrid Laurier pointed out in the Canadian Naval Debates of 1910, the actual extent to which any Dominion should give active assistance to the Imperial Government was for it alone to decide. A recommendation had indeed been put forward by a Royal Commission appointed by the Governor of Victoria in 1870 that the Australian Colonies should be given the right to make treaties and granted the status of neutral states under the British Crown, but this impracticable suggestion was never seriously entertained in any of the Dominions, and the constitutional position was clearly understood by them. In fact, their reasoned consent was not obtained to the decision of the Imperial Government to declare war in 1914, but neither from them nor from any foreign power was there any suggestion that they could maintain an attitude of technical neutrality without seceding from the Empire. Thus the German Foreign Office announced on August 13, 1914, in answer to inquiries of traders that " Germany must

[1] *Annual Register*, 1884, pp. 432–434.

be considered at war with all British Colonies." [1] The control of the Imperial Government over foreign affairs was emphasised by the fact that the Dominions had no Foreign Offices, nor did they send or receive diplomatic agents. It is true that Australia in 1900, and Canada in 1910, created Departments of External Affairs, but the primary objects of these Departments was to deal with matters arising between the Dominion concerned and other parts of the Empire.[2] The Canadian Department has actually conducted constant negotiations with the United States, but in each case the British Ambassador at Washington has acted as intermediary.

(2) In the case of commercial agreements the Dominions had acquired an autonomy, which they had not obtained over the conduct of other foreign affairs. The Canadian Government in 1895 insisted on autonomy with respect to the imposition of tariffs, and this being granted, self-governing Colonies followed the Canadian lead. It then became necessary for the Imperial Government to help the Dominions in negotiating their commercial arrangements with foreign Powers, and the practice was adopted of associating a Dominion representative with the British Ambassador to the foreign country concerned. At first the British Ambassador alone signed any convention that might be concluded, but after 1884 it became the invariable practice for the Dominion negotiator also to sign, and in fact the tendency was for the Ambassador to play merely a nominal part in the negotiations. In 1895 Lord Ripon in a letter to the Governments of the self-governing Colonies approved of the principle that they should conduct their tariff arrangements through their own agents, subject to the proviso that the Imperial Government should be kept informed of the progress of the negotiations; he pointed out that the proviso was necessary because—

" to give the Colonies the power of negotiating treaties for themselves without reference to Her Majesty's Government would be to give them an international status as separate and independent States, and would be equivalent to breaking up the Empire into a number of independent States, a result which Her Majesty's Government are satisfied would be injurious equally to the Colonies and to the Mother Country and would be desired by neither." [3]

This method of negotiation was adopted in 1907 when arrange-

[1] *Daily Chronicle*, Aug. 14, 1914.

[2] *Journal of the Society of Comparative Legislation*, Jan. 1917. Article on " Treaty-making Power of the Dominions," by Sir C. H. Tupper.

[3] Keith, *Selected Speeches and Documents on British Colonial Policy*, p. 159.

ments for a new Canadian commercial treaty with France were entrusted to Canadian Ministers only, although the arrangement finally arrived at was signed jointly by them and by the British Ambassador at Paris.

But even this method was not altogether satisfactory to the Canadian Government, since it involved the intervention of the Imperial Government not only in the grant of authority to negotiate but also in the signature and ratification of the treaty when concluded. Accordingly, the Canadian Government adopted the plan of entering into arrangements with foreign consuls at Ottawa, followed by legislative action, but without concluding any formal treaties. In this way all reference to the Imperial Government was avoided. Informal agreements on this plan were made with Germany and Italy in 1910, while in January, 1911, the agreement between Canada and the United States for reciprocity in trade relations was negotiated. But this last step led to the downfall of the Canadian Ministry, and no further attempts to conclude such informal agreements were made.[1]

As a natural corollary to the decentralisation of the power of negotiating commercial treaties, the Imperial Government introduced the practice of including in its own commercial treaties a clause providing that they should only become applicable to the Dominions if the latter gave notice of adherence within a certain period of time. Thus in 1883 the commercial treaty between Great Britain and Italy permitted the self-governing Colonies to adhere within one year, and a similar clause was inserted in subsequent treaties negotiated by Great Britain.

The right of separate withdrawal was acquired later, the first treaty in which it appears being the Convention between Great Britain and Uruguay in 1899. Since that date, in a long series of treaties, the Crown has been given the power to withdraw from an old treaty on behalf of one or more of the Dominions on giving a year's notice, such withdrawal not affecting the validity of the treaty in respect of the remainder of the Empire.[2]

(3) In certain international conferences of a purely administrative and non-political character the Dominions were granted representation. Thus they were admitted side by side with the Imperial Government to the Universal Postal Union of 1906,

[1] Keith, *Responsible Government in the Dominions*, p. 1118.
[2] Keith, *Imperial Unity and the Dominions*, pp. 262–268.

and have votes at postal conferences. Moreover, at the Radio-Telegraph Conference, 1912, the Dominions were represented by special delegates possessed of full powers under the Great Seal of the United Kingdom " on behalf of the Dominion concerned," and a similar plan was adopted at the International Conference on the Safety of Life at Sea, 1913. The significance of this procedure lies in the fact that the votes of the various plenipotentiaries representing the Dominions and the United Kingdom might be differently cast.

The foregoing summary of the position of the Dominions suggests the inevitable conclusion that in the period under review the British Empire was for purposes of international law a unitary state and that the Dominions had not acquired any international status. The control exercised by the Imperial Government over Dominion legislation, judicial appeals, and, in particular, over foreign policy, debarred the Dominions from making any assertion of international personality. In the words of Professor Oppenheim " they had no international position whatever, because they were from the point of view of international law, mere colonial portions of the mother country." [1] The right to representation at administrative conferences and the modified right of negotiating commercial treaties were not sufficient in the absence of any other external attributes of sovereign status to give the Dominions any separate legal existence in international law, although Professor Oppenheim characterises their position as being " somewhat anomalous."

Developments in Dominion Status between 1914 *and* 1918.

The changes effected in the status of the Dominions during the war are of importance from the point of view of constitutional rather than of international law, but since they paved the way for developments in the latter sphere they require a brief notice.

On the outbreak of war, the executive for the Empire was a Cabinet of twenty-two Ministers responsible to the Imperial Parliament. This body proved too cumbersome to exercise effective control over the conduct of the war, and after various experiments had been tried the supreme direction of the war was entrusted from December, 1916, onwards to a Cabinet of five freed from all departmental duties, while administrative responsibility remained in the hands of Ministers who were left free to

[1] Oppenheim, *International Law* (1920), Vol. I. S. 94 (*a*).

devote the whole of their time to departmental work and were called in to the War Cabinet for consultation when their Department was concerned.[1]

But, important as was the institution of the War Cabinet, the year 1917 witnessed an even greater constitutional development in the creation of the Imperial War Cabinet. The part played by the Dominions in the war made imperative the recognition of their claims to share in the deliberations on and control of Imperial policy, and this step was taken when the Dominion Prime Ministers were invited to attend a series of special and continuous meetings of the War Cabinet. From this invitation there resulted two bodies, the Imperial War Cabinet and the Imperial War Conference.

The Imperial War Cabinet consisted of the British War Cabinet and the Dominion representatives sitting together under the presidency of the Prime Minister of the United Kingdom, and its functions were deliberation about the conduct of the war and discussion of the larger issues of Imperial policy connected therewith. The Dominion representatives were on a footing of equality with members of the British War Cabinet; they were not merely present in a consultative capacity but had power of initiation and examination of policy, each Dominion representative retaining his responsibility to his own electorate.[2]

The second body evolved as a result of the invitation in December, 1916, was the Imperial War Conference. This body was presided over by the Secretary of State for the Colonies and consisted of the Overseas Representatives together with a number of Ministers of the United Kingdom. Its function was to discuss non-war problems affecting the Empire as a whole and questions connected with the war but of lesser importance.

Two important decisions were reached by these bodies during the course of their meetings between March and May, 1917.

The Imperial War Cabinet unanimously decided that its meetings should be held "annually, or at any intermediate time when matters of urgent Imperial concern require to be settled."[3] In accordance with this decision the Imperial War Cabinet met between June and July of 1918, and again in November, 1918, when it remained in continuous session under

[1] *War Cabinet Report*, 1917, *Parl. Papers*, 1918 [Cd. 9005], p. 1.
[2] *Ibid.*, 1917, p. 7.
[3] *Ibid.*, p. 7.

the name of the British Empire Delegation till the signing of the Treaty of Versailles in June, 1919.

The second resolution was passed by the Imperial War Conference. It declared that a special Imperial Conference should be summoned after the war to consider the "readjustment of the constitutional relations of the component parts of the Empire," and laid down that any such readjustment—

"should be based upon a full recognition of the Dominions as autonomous nations of an Imperial Commonwealth, and of India as an important part of the same, should recognise the right of the Dominions and India to an adequate voice in foreign policy, and in foreign relations, and should provide effective arrangements for continuous consultation in all important matters of common Imperial concern, and for such necessary concerted action founded on consultation as the several Governments may determine." [1]

In estimating the significance of the Imperial War Cabinet and the Imperial War Conference and the resolutions passed by them it must be borne in mind that, unlike the British War Cabinet, neither of these bodies is, strictly speaking, entitled to be called a Cabinet. The characteristic of a Cabinet in the British Constitution is the individual and collective responsibility of its members to a Parliament; it enjoys executive power because it can act through its members as executive heads of Government Departments, and assume full and united responsibility for action so taken.

But neither the Imperial War Cabinet nor the Imperial War Conference owed collective responsibility to any one Parliament, nor had they any inherent executive capacity. A decision of either body could not be directly enforced in the Dominions; in order to become operative it required the concurrent action of the various Dominion Governments concerned.

Like the Cabinet of the United Kingdom, the two bodies in question are unknown to the law. Their constitution and functions are built up on a foundation of convention and not of law, and it is this fact which gives them elasticity. Experiments in their constitution, functions, and procedure can be tried without the necessity of any Parliamentary intervention and can be perpetuated or abandoned according as they prove successful or unsuccessful. The resolutions passed in 1917 and 1918 prove that the two bodies met a real need and marked a new stage in the development of the British Constitution. Their result has

[1] *War Cabinet Report, ibid.*, p. 9.

been to give the Dominions a constitutional right to be consulted on all important questions of Imperial policy, and in this respect, therefore, the Dominions in the period between 1914 and 1918 had gone a long way in the direction of equality of status in the realm of constitutional law.

On the other hand, in the sphere of international law they had made no perceptible formal advance. The years of war were not a suitable time in which to urge claims to separate international personality, since such action might have embarrassed the British Empire by causing prejudice amongst her allies. The Dominions, therefore, did not press their case, but their claims were merely lying dormant, and the consolidation of their status within the Empire in the war period prepared the way for the establishment of their international status in the resettlement after the war.

The Present Position of the Dominions.

When the Armistice was signed, on November 11, 1918, the question of Dominion representation at the ensuing Peace Conference had to be confronted. As far as the Imperial Government was concerned the right of the Dominions to direct and separate representation had been tacitly admitted by the Resolution of the Imperial Conference of 1917 declaring the principle of equal nationhood, but the other Great Powers had not appreciated the change that had taken place in the British Constitution during the war and raised strong objection to the proposed representation of the Dominions. But, as a consequence of the firm attitude displayed by the Dominion Prime Ministers, it was finally settled that Dominion representatives were entitled to places among the five members allotted to the British Empire in the Council of Twenty-five, while in the Plenary Conference the Dominions were represented in two ways: (*a*) as "Small nations"; Australia, Canada and South Africa were represented by two delegates each, New Zealand by one, (*b*) Dominion Representation was also entitled to appear on the delegation of five allotted to the British Empire in the Plenary Conference. Thus the Dominions were really granted fuller representation than was accorded to the smaller allied nations.[1]

[1] A detailed account of the part played by the Dominions at the Peace Conference is to be found in *The British Commonwealth of Nations*, by H. Duncan Hall, 1920, London, Methuen, pp. 180–190.

The Council of Twenty-five was subsequently reduced to ten, and then to five. It thus became impossible for the Dominions to be directly and separately represented on such a body, but the Canadian Prime Minister was selected on several occasions to present the British case to the Council of Five. This recognition of the international status of the Dominions was further emphasised in the signatures to the various Peace Treaties. In March, 1919, Sir Robert Borden circulated a Memorandum on behalf of the Dominion Prime Ministers laying down the principle that—

" all the treaties and conventions resulting from the Peace Conference should be so drafted as to enable the Dominions to become Parties and Signatories thereto. This procedure will give suitable recognition to the part played at the Peace Table by the British Commonwealth as a whole, and will, at the same time, record the status attained there by the Dominions. The procedure is in consonance with the principles of constitutional government that obtain throughout the Empire. The Crown is the Supreme Executive in the United Kingdom and in all the Dominions, but it acts on the advice of different Ministries within different constitutional units; and under Resolution IX. of the Imperial War Conference, 1917, the organisation of the Empire is to be based upon equality of nationhood." [1]

The principle formulated in the Memorandum was accepted, and plenipotentiaries were appointed to sign the Treaties on behalf of the Dominions. Thus the Treaty of Peace with Germany reads :—

" For this purpose the High Contracting Parties represented as follows. . . . His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions Beyond the Seas, Emperor of India by :—

The Right Hon. D. Lloyd George, M.P., etc.,

and—

For the Dominion of Canada by
The Hon. Charles Joseph Doherty, etc.
For the Commonwealth of Australia by
The Right Hon. William Morris Hughes.
For the Union of South Africa by
General the Right Hon. Louis Botha, etc.
For the Dominion of New Zealand by
The Right Hon. William Ferguson Massey."

The wording is significant in that it presumes the formal unity of the British Empire under the Imperial Crown while giving effect to the individual international personality of each of the Dominions.

[1] *Canadian Sessional Paper*, 41, J.

This process was carried a step further in the procedure adopted for securing ratification of the Treaty, which was debated and approved by each Dominion Parliament and was ratified for it, not on the advice and responsibility of the Government of the United Kingdom, but on the advice and responsibility of the Dominion Government concerned.[1]

The Dominions consolidated their newly acquired international status by becoming, and being recognised as, original members of the League of Nations. They are entitled to the same representation in the Assembly of the League as sovereign states, and there is no legal obstacle to one or more of the Dominions being elected to the Council of the League as the representatives of the Assembly. In fact, as far as the League is concerned, they have the same rights, and duties, as independent states, and these rights and duties are increased by the fact of their being appointed Mandatory States over certain former colonies of the German Empire. The Union of South Africa has been given a " C " mandate for German South-West Africa, New Zealand for Samoa, and Australia for certain islands in the South Pacific. It is significant that these mandates were received by the Dominions direct from the Secretariat of the League of Nations, and correspondence thereon is not being conducted through the Imperial Government. That this is a deliberate policy is shown by the fact that New Zealand wished to take her mandate through the Imperial Government, but in consequence of the attitude adopted by South Africa and Australia all the mandates were issued direct.[2] The Dominions concerned are, therefore, responsible for their mandates not to the British Government but directly to the League of Nations.

As original members of the League of Nations the Dominions are also members of the International Labour Organisation for which provision was made in the various Treaties of Peace. As such, they are entitled to direct and separate representation at all General International Labour Conferences, and at the three Conferences already held they have not only availed themselves of their right to be represented, but have, on occasions, indulged in cross-voting both amongst themselves and with the representatives of the British Empire.

[1] See Order in Council for Canada advising the ratification of the Treaty by the Crown quoted in *Sessional Paper*, 41, J.

[2] *Round Table*, Sept. 1921, pp. 961–966.

These considerations appear sufficient to prove and illustrate the fact that the Dominions have acquired a definite international status, the real difficulty being to define the nature of such status. The Imperial War Conference of 1917 had foreshadowed a Conference to be held after the war which would define the constitutional relation of the constituent parts of the Empire and so throw light on the position of the Dominions in international law. But the Conference of Prime Ministers held between June 20 and August 5, 1921, has done very little to clarify the situation. The Conference expressed the opinion that " having regard to the constitutional developments since 1917, no advantage is to be gained by holding a constitutional Conference "; at the same time a resolution was passed with the object of maintaining—

" the existing practice of direct communication between the Prime Ministers of the United Kingdom and the Dominions, as well as the right of the latter to nominate Cabinet Ministers to represent them in consultation with the Prime Minister of the United Kingdom."

The Conference also declared that Conferences should be held " annually or at such longer intervals as may prove feasible." [1] It is obvious that these resolutions throw no new light on Dominion status, and in the absence of any authoritative announcement it remains for us to draw our own conclusions from the known premises.

In the first place it may be said that a constitutional convention has arisen, giving to the Dominions the right to be consulted as to the policy of the British Empire. It is inconceivable that any important international step should be taken in the future by the Government of Great Britain without the Dominions being given the opportunity of expressing their views on it. As the Official Report of the Conference of Prime Ministers in 1921 says—

" It was unanimously felt that the policy of the British Empire could not be adequately representative of democratic opinion throughout its peoples unless representatives of the Dominions and of India were frequently associated with those of the United Kingdom in considering and determining the course to be pursued." [2]

[1] *Report of Conference of Prime Minister and Representatives of the United Kingdom, the Dominions and India*, 1921, *Parl. Papers* [Cd. 1474], p. 6.

[2] *Ibid.*, p. 3.

In conformity with the precedent created during the war members of the Conference were—

" invited to meetings with members of the British Cabinet called to deal with Imperial and foreign affairs of immediate urgency which arose in the course of the sittings."

And the Report goes on to point out that the British policy with respect to Upper Silesia, which was affecting the relations between Great Britain and France, was determined by the Conference. Moreover, there was a full discussion of the subjects which were to be considered at the Washington Conference and agreement was reached on the main issues of the problem of the Pacific, as also on the question of disarmament. Discussion of these topics was the more necessary in that the British Empire was represented as a unit at the Washington Conference and had only one vote although the British Delegation included representatives from the Dominions. In fact, it may safely be asserted that the days have passed when the Imperial Government is likely to commit the Empire as a whole to a course of policy without reference to the Dominions.

But the scope of individual autonomous action enjoyed by the Dominions is still to be examined.

With reference to legislation, General Smuts has declared that " the doctrine that the British Parliament is the sovereign legislative power for the Empire no longer holds good." This statement undoubtedly goes too far, but it is clear that the doctrine of the legislative supremacy of the British Parliament has received a new constitutional interpretation; it is to be used, not with the object of overriding domestic Dominion legislation, but for the purpose of supplementing such legislation in order to give it full effect. Its function is " not to destroy the law but to fulfil it." A striking example of this is to be found in the procedure consequent on the grant to New Zealand of a mandate for West Samoa on behalf of the League of Nations. In view of the principle that a Dominion cannot legislate for territories beyond its limits,[1] advantage was taken of the Foreign Jurisdiction Act, 1890, and the Western Samoa Order in Council was gazetted thereunder on March 11, 1920, providing that—

" Whereas by treaty, capitulations, grant, usage and other lawful means His Majesty the King has jurisdiction in the said islands, and it is expedient to

[1] See *Rex* v. *Lander* (1919), N.Z. L.R., 305.

determine the mode of exercising such jurisdiction : Now therefore, His Majesty, by virtue of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased by and with the advice of his Privy Council to order and it is hereby ordered as follows . . . the Parliament of New Zealand shall have full power to make laws for the peace, order, and good government of Western Samoa in accordance with the provision of the Treaty of Peace, and further that until that Parliament otherwise provides, the executive Government of New Zealand may by Order in Council exercise the like authority."

In accordance with this and with the New Zealand Treaties of Peace Act, 1919, the Samoan Constitution Order was made on April 1, 1920.

Moreover, when legislation of a uniform nature throughout the Empire is required the procedure adopted in recent years is joint consultation followed by a recommendation advocating individual action on the part of the various Governments. Thus the Report of the 1921 Conference contains the following resolution :—

" The Conference approves the recommendations made in the report of the Imperial Shipping Committee on the limitation of shipowners' liability by clauses in bills of lading, and recommends the various Governments represented at the Conference to introduce uniform legislation on the lines laid down by the Committee." [1]

These considerations suggest that the constitutional doctrine of the legislative supremacy of the Parliament of Great Britain does not, as a matter of fact, derogate from the legislative autonomy of the Dominions.

With regard to the judiciary the position remains as it was before 1914, and there has been no serious attempt to abolish the functions of the Judicial Committee of the Privy Council as the final Court of Appeal from the Dominions, although suggestions have been made for a reform in its constitution so as to secure permanent representation for the Dominions on it.

It is in respect of executive authority, and, in particular, of the control of foreign policy that the position of the Dominions appears to be most obscure. It may safely be asserted that they have secured a constitutional right to separate diplomatic representation, for it was announced in May, 1920,[2] that the Crown on the advice of its Canadian Ministers would—

" appoint a Minister Plenipotentiary who will have charge of Canadian affairs, and will be at all times the ordinary channel of communication with the United States Government in matters of purely Canadian concern acting upon instructions from and reporting direct to the Canadian Government."

[1] *Report*, p. 8. [2] Hansard, May 10, 1920.

In spite of this announcement no Canadian Minister to the United States has yet been appointed, but the possibility of such an appointment remains. Mr. Bonar Law in the course of the statement quoted added that—

" this new arrangement will not denote any departure either on the part of the British Government or of the Canadian Government from the principle of the diplomatic unity of the British Empire,"

by which is apparently meant that " group questions " will continue to be dealt with by the British Ambassador, the functions of the Dominion representative being confined to questions of purely Dominion concern. It is, however, obvious that the establishment of Dominion diplomatic representatives will inevitably give rise to difficult questions as to their exact relation to the British Ambassador; but it is a characteristic of the British Constitution to let such questions solve themselves by experience.

The Dominions have already entered into direct diplomatic relations with the League of Nations in respect of their mandated territories, and this may furnish a precedent for direct negotiation with individual foreign states. As has been pointed out, the Dominions had enjoyed even before the war, the power of entering into informal agreements of a commercial character with foreign states, and it appears that constitutional developments since the war have increased that power. The insistence by the Dominions on the appointment of separate plenipotentiaries for the purpose of signing the various Treaties of Peace, and on the necessity of separate ratifications after debate in the Dominion Parliament, has established the right of the Dominions to participate in the conclusion of formal treaties and conventions affecting the Empire as a whole. Further, according to the latest constitutional practice, where the British Government has entered into a treaty with a foreign Power without consulting the Dominions liberty has been reserved to the latter to dissociate themselves from the treaty. Thus in the abortive treaty signed at Versailles on June 28, 1919, between Great Britain and France, providing for British assistance to France in the event of unprovoked aggression by Germany, Article V. provided that—

" The present Treaty shall impose no obligation upon any of the Dominions of the British Empire unless and until it is approved by the Parliament of the Dominion concerned." [1]

[1] A similar clause has been inserted in the proposed pact between Great Britain and France drafted at Cannes in Jan. 1922.

But this constitutional practice does not necessarily imply that the Dominions have the right of entering into separate and direct negotiations with foreign states. The question has actually arisen in New Zealand in the course of correspondence between the Acting Prime Minister and the American Consular Agent, when the acting Prime Minister stated in a letter that—

"The Dominion of New Zealand does not assume authority to communicate directly with the Government of the United States or of any country other than Great Britain, and it is an invariable rule that communications from any foreign country to the Government of New Zealand must be in the form of communications to the Government of Great Britain, which, according to its discretion, communicates with the Government of New Zealand, and obtains from the Government material to enable His Majesty's Government to reply to the foreign Government." [1]

It is, however, safe to say that New Zealand is the most conservative of the Dominions in interpreting her status, and it is not unlikely that South Africa, Australia and Canada would be unwilling to subscribe to the sentiments expressed in Sir Francis Bell's letter.

In the right of entering into diplomatic relations with foreign Powers is involved the right of making war and peace. But the question of the possession of such a right by the Dominions appears to be of academic rather than practical interest. No Dominion has yet reached such a stage of military, naval and air strength as to be able to undertake a war on her own account. Moreover, it is generally agreed that a declaration of war by any part of the British Empire would technically involve the rest of the Empire in belligerency, since allegiance to the same sovereign necessarily involves this. It would be open to any part of the Empire to pursue a policy of passive as opposed to active belligerency, but a declaration of neutrality would imply a secession. The question was discussed in an indirect form with reference to the position under the Covenant of the League of Nations in the event of a dispute likely to lead to a rupture, arising between any state of the British Empire and a foreign Power. The Canadian Government through Mr. Rowell then laid down that—

"Canada owes allegiance to the same Sovereign as Great Britain, and so long as she continues to do so she would be a party in the interest and disentitled to a vote. If she disclaimed her interest and claimed the right to vote she would thereby proclaim her independence." [2]

[1] Letter of July 8, 1921, quoted in *Round Table*, Dec. 1921.

[2] *Morning Post*, Feb. 4, 1920. Cf. Viscount Grey's letter to *The Times*, Jan. 31, 1920.

Bearing this consideration in view it is highly unlikely that any Dominion would declare war on her own initiative without consulting the rest of the Empire and assuring herself of their active support.

The main fact that emerges from a detailed consideration of Dominion status is that it is still in a state of transition. It seems clear that the British Empire has ceased to be an Incorporate Union, but the exact lines of its evolution are hard to define. It shows a tendency to develop on the direction of a Confederation of States, called in German a " Staatenbund," as contrasted with a " Bundesstaat " or Federal Union.

Wheaton describes a Staatenbund as follows :—

" The several states are connected together by a compact which does not essentially differ from an ordinary treaty of alliance. Consequently the internal sovereignty of each member of the union remains unimpaired; the resolutions of the federal body being enforced, not as laws directly binding on the private individual subjects, but through the agency of each separate government, adopting them, and giving them the force of law within its own jurisdiction. Hence it follows that each confederated individual state and the federal body for the affairs of common interest may become, each in its appropriate sphere, the object of distinct diplomatic relations with other nations." [1]

The classic example of such a Staatenbund is found in the German Confederation which lasted from 1815 to 1866. In it, each state retained the right of entering into diplomatic negotiations with foreign states, provided they were not directed against the security of the Confederation, or of the individual states of which it was composed. Each state also retained its right of legation both with respect to foreign Powers and to its fellow members. The central authority was confided to a Diet which sat at Frankfort-on-the-Maine, in which the respective states were represented by their Ministers, and which had the power of negotiating treaties and of declaring war against foreign Powers in case the territory of the Confederation was threatened. The several states had no power of withdrawing from the Confederation, and once war had been declared by the Diet they could not make a separate peace.

The detailed points of difference between the German Confederates and the British Empire do not require comment, but there is one essential difference between them which must be noticed. The German Confederation was the outcome of centri-

[1] Wheaton's *International Law* (Eng. ed. 1878), p. 57.

petal forces in Germany; it was a step in the direction of Imperial unity. The states comprising it were not yet prepared to lose their international entity, but they desired to abandon a policy of isolated action for one of combination under a common government. There was no question of common allegiance and common nationality. On the other hand, the present position of the British Empire is due to centrifugal forces; a unitary state is, to some extent, dissolving into its component parts; the bonds that held it together have been loosened although they have by no means been cut. The formal unity of the Empire under the Imperial Crown is preserved and there is still common allegiance and common nationality. There does not appear to be any inclination to set up any body in the nature of the Federative Diet of the German Confederation. Even if it were possible to vest the Conference of Prime Ministers with executive powers, it would still be too occasional and nebulous a body to be compared with the Diet. In the absence of such a Diet it still devolves on the Government of Great Britain to act for the Empire as a whole, subject to the constitutional convention that the Dominions have the right to prior consultation. Modifications in constitutional relations may take place, but there appears to be no desire to sever the formal unity of the Empire. Responsible opinion realises that the Dominions have a strong international position because they are parts of a greater whole; in union lies strength. Hence the Report of the 1921 Conference of Prime Ministers observes that—

> " The discussions . . . revealed a unanimous opinion as to the main lines to be followed by British policy, and a deep conviction that the whole weight of the Empire should be concentrated behind a united understanding and a common action in foreign affairs." [1]

To achieve this unity of purpose and action the Dominions must necessarily forgo a part of their liberty of action, and therein they differ in international status from a normal unitary and independent state.

" Independence," says Westlake, " like every negative, does not admit of degrees. A group of men dependent in any degree on another group is not independent, but has relations with that other group which as between the two are constitutional relations. Sovereignty is partible. A group of men is fully sovereign when it has no constitutional relations making it in any degree

[1] *Report*, p. 2.

dependent on any other group; if it has such relations, so much of sovereignty as they leave it is a kind or degree of semi-sovereignty, though the constitution may not call it by that name." [1]

This appears to be an accurate description of the position of the Dominions, for, by becoming "partners" in the British Empire they are pledged to pursue a common partnership policy. They have the power to manage their own private affairs and to enter into relations with other international persons, but they are not fully sovereign states because their independence is necessarily limited by their obligations to the partnership.

[1] Westlake, *Collected Papers* (1914), p. 87.

THE TERRITORIALITY OF BAYS

By SIR CECIL HURST, K.C.B., K.C.

ARTICLE 2 of the North Sea Fisheries Convention, 1882, provides as follows :—

" The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependent islands and banks.

" As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.

" The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs."

The purpose of this Convention is stated in Article 1 to be " to regulate the police of the fisheries in the North Sea outside territorial waters." What, then, were the framers of the Convention doing when they inserted as Article 2 a provision which is not limited to the North Sea, and has no reference to policing fisheries at all, but indicates the exclusive character of the fishing rights within territorial waters generally, and indicates what those waters are? The answer is that the delegates who framed the text thought that as it was the fisheries outside territorial waters which they were to regulate, it was necessary to agree on a definition of the waters which were not to be subject to the Convention; and that as fisheries were the only subject with which they were authorised and qualified to deal, the character of the waters within the three-mile limit must be expressed in terms of fisheries and described as being the waters within which the fishermen of each country enjoyed an exclusive right to fish. That the waters within these limits constituted the " territorial waters " for the purpose of the Convention is shown by the last paragraph of the Article where the phrase itself is used. It was a clumsy method of proceeding, but circumstances forced it upon the representatives who attended the Conference.

Apart from the foregoing criticisms, the wording of the second paragraph as to bays raises a question which deserves examination, particularly by British students of international law. The paragraph says that in the case of bays the distance of three miles is to be measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles, or, to put it more briefly, from a straight line drawn across the bay where it first narrows to ten miles.

What is the status of the portion of the bay inwards from the line so drawn? Are the waters lying inwards of that line territorial waters like the waters lying seawards of the line? If they are not territorial, do they differ from territorial waters, and, if so, in what respect do they differ?

It is a curious thing that none of the chief British writers on international law—despite the fullness with which they deal with the subject of territorial waters or the marginal belt—seem to give clear guidance on the question of these internal waters of a bay.

Oppenheim [1] appears to consider the waters of a bay which is territorial as being subject to the same rules as the waters of the marginal belt along the coasts, but he admits that the matter is unsettled. Lawrence [2] says nothing to show that he draws any distinction between the status of territorial waters and that of the waters of ports and bays. Hall [3] uses the word "territorial" rather loosely, but the general upshot of his views is that no restriction is to be made between the waters of the marginal belt and those of closed bays and of straits. While no state is nowadays likely to claim a right of property over large bays with wide entrance, Hall sees no valid reason against the establishment of claims to basins of considerable area, if the entrance is narrow as in the case of the Zuyder Zee, or to bays which run far into the land in proportion to their width like Delaware Bay, or still more to small bays like the Bay of Cancale. Westlake [4] says that the inner part of a bay will belong to the country, if it is not more than six miles across at the mouth and access can only be obtained through territorial waters;

[1] *International Law*, 3rd ed., Vol. I. § 193, p. 346.
[2] *Principles of International Law*, 4th ed., pp. 185–207.
[3] Hall, *International Law*, 7th ed. (1917), § 41, pp. 155–161.
[4] *International Law*, 2nd ed. (1912), Part I. Peace, p. 191.

but he makes an exception for bays which penetrate far inland and by immemorial usage are recognised as territorial sea.

This is all too vague to be of any real help; yet there is ample material to establish a clear and definite rule, at any rate so far as Great Britain is concerned.

If the material provided by treaties, statutes, decisions in the municipal courts and awards in international arbitrations where Great Britain was a party is considered, there is not much scope left for doubt as to what must be the British view about the correct rule of international law as to the status of the internal waters of a bay, and as to the difference between them and territorial waters.

Passing over the rather obscure passage in Fitzherbert's *Abridgement*,[1] of which Lord Blackburn gives a translation in his judgment in the Conception Bay case,[2] we may start from the principle enunciated by Lord Hale in *De Jure Maris*, p. 1, c. 4.

> " That arm or branch of the sea which lies within the *fauces terrae* where a man may reasonably discerne between shore and shore is, or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner."

This passage from Lord Hale's treatise has been quoted with approval in various judicial decisions and contains the kernel of British doctrine on the subject.

In *Reg.* v. *Cunningham* [3] a question arose as to whether a spot in the Bristol Channel where there lay at anchor a foreign vessel on which an assault had been committed was or was not within the county of Glamorgan. The prisoners had been charged on an indictment which treated the offence as having been committed within that county, and the point was taken on behalf of the prisoners that the indictment was bad and that the proceedings should be quashed because the vessel was anchored at a place which was not within the county but was part of the open sea.

The Bristol Channel is a bay. It is large if judged by the standard of size in the United Kingdom, but it is small compared with many of the gulfs and bays of the New World. At the point where the vessel was anchored the channel is ten miles across, but not so wide as that a man may not " reasonably discerne "

[1] Corone 399, 8th ed., 2. Fitzherbert's *Abridgement*, 1565.
[2] (1877) L.R. 2.A.C. 394.
[3] (1859) Bell's C.C. 86.

between shore and shore. The vessel was within three miles of the shore and therefore undoubtedly the water where she lay was not part of the high seas. It was necessary, however, for the prosecution to prove more than that the offence was committed within waters where by international usage exclusive jurisdiction can be claimed as against foreign countries; it was necessary to prove that it was committed in the county of Glamorgan. After an elaborate argument both on behalf of the Crown and of the prisoners the court decided that the whole of this inland sea between the counties of Somerset and Glamorgan was to be considered as within the counties by the shores of which its several parts are respectively bounded. It was therefore held that the place where the offence was committed was in the county of Glamorgan and the conviction was affirmed.[1]

Here, then, is a clear decision that at common law the internal waters of a bay are in the county; that is to say, they are part of the national territory.

In 1876 came the case of *R.* v. *Keyn*,[2] a case which shows equally clearly that the waters within the three-mile limit, the marginal belt which is usually designated as " territorial waters," are not part of the national territory. If they were, there could have been no question but that an offence committed at sea within those waters would be within the common law jurisdiction of the courts, and if within the common law jurisdiction, Keyn could and should have been tried at the Kent Assizes.[3] Keyn was tried under the Admiralty jurisdiction, and the question so elaborately argued and decided by so narrow a majority of the judges related solely to the question whether the Admiral had ever had jurisdiction over an offence committed by a foreigner on board a foreign ship within the waters of the open sea along the coast. It was common ground that low-water mark along the coast was the limit of the county, and that British jurisdiction

[1] Hall in his work on *International Law* (7th ed., p. 160) suggests that it may have been intended only to hold that the part of the channel between the two islands and the Welsh coast was part of the county, but this is a mistake. The judgment makes it clear that it was the whole width of the Bristol Channel which was held to form part of the riparian counties.

[2] (1876) L.R. 2 Ex. Div. 63. Keyn was the master of the German ship *Franconia* which within two miles from Dover pier negligently ran into and sank the British steamer *Strathclyde*, thereby killing J.D., a British subject, on board the latter vessel. The circumstances in which J.D. was killed amounted to manslaughter by Keyn in English law.

[3] See the dilemma posed by Cockburn C. J., at p. 229 of L.R. 2 Ex. Div.

beyond that line was the jurisdiction of the Admiral and not the jurisdiction of the county. The marginal belt is part of the open sea, and on the open sea the coroner and the sheriff—the repositories of the common law jurisdiction—had no powers. "No one ever heard of the body of a county extending three miles into the sea," said Sir J. Nicholl in *R.* v. *Forty-nine Casks of Brandy*.[1]

When the court decided that there was no jurisdiction to try Keyn at the Central Criminal Court, and when the enactment of the Territorial Waters Jurisdiction Act, 1878, became necessary in consequence, it was within the jurisdiction of the Admiral that offences by a foreigner on a foreign ship within the marginal belt were declared to lie. No attempt was made to constitute these waters part of the national territory.

These two cases suffice to establish the proposition that a clear distinction exists between the marginal belt, commonly known as territorial waters, and the internal waters of a bay. To mark the distinction it will be well to describe these latter as "national waters."

It is well to bear in mind that the Territorial Waters Jurisdiction Act makes no mention of bays. It deals only with the open seas adjacent to the coast.[2] The explanation of the

[1] 3 Hagg, Adm. 259.

[2] The text of the important provisions is as follows :—

Whereas the rightful jurisdiction of Her Majesty, her heirs and successors extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's Dominions to such a distance as is necessary for the defence and security of such Dominions :

And whereas it is expedient that all offences committed on the open seas and within a certain distance of the coasts of the United Kingdom, and of all other parts of Her Majesty's Dominions, by whomsoever committed, should be dealt with according to law :

Section 2.

An offence committed by a person, whether he is or is not a subject of Her Majesty, on the open sea within the territorial waters of Her Majesty's Dominions, is an offence within the jurisdiction of the admiral, although it may have been committed on board or by means of a foreign ship, and the person who committed such offence may be arrested, tried, and punished accordingly.

Section 7.

"The territorial waters of Her Majesty's Dominions," in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's Dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty ; and for the purpose of any offence declared by this act to be within the jurisdiction of the admiral, any part of the open sea within one marine league of the coast measured from low-water mark shall be deemed to be open sea within the territorial waters of Her Majesty's Dominions.

absence of all reference to bays is that it was unnecessary. As the law then stood there was no doubt that appropriated bays formed part of the territory, and offences committed within them would, therefore, not fall within the jurisdiction of the Admiral. If the bays were unappropriated, they formed part of the open sea and were covered by the general wording employed in the Act.

R. v. *Cunningham*, the Bristol Channel case, is not by any means an isolated decision of the English courts. It was followed and relied upon by the Privy Council in the Conception Bay case.[1] In that case one company enjoyed a monopoly of the right to maintain telegraph lines in Newfoundland, and another company, which was engaged in laying a cable from the United States to Europe, brought its cable into Conception Bay and fixed it to a buoy anchored thirty miles up the bay, but more than three miles from the shore. The cable was then used for sending service messages to the United States. The court held that the former company's monopoly in Newfoundland was infringed. This decision was based upon the view that the waters of the bay formed part of the colony. Conception Bay is a well-marked bay, being some forty miles in length with an average width of fifteen miles and a width of twenty miles at the mouth.

It should be noticed that the principle enunciated by Lord Hale (see above, p. 44), which was quoted with approval by Lord Blackburn in the judgment of the Privy Council, says that an arm within the "*fauces terrae*" is, or at least *may be*, within the jurisdiction. To establish the fact that a particular bay forms part of the territory requires proof of acts of appropriation on the part of the Government concerned. As regards Conception Bay, the Privy Council found such acts of appropriation in the various Acts of Parliament passed for the purpose of enforcing the fishery treaties with the United States. These Acts of Parliament excluded *all* foreigners, and not merely Americans, from fishing in the bay.

In *Mowat* v. *McFee*[2] the Supreme Court of Canada treated the internal waters of the Bay of Chaleurs as part of the territory of the Dominion and subject to the Canadian Fisheries Act as such. The spot where the seizure which gave rise to that litigation took place was more than three miles from the shore of the bay.

[1] *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* [1877] L.R. 2 A.C. 394.

[2] 5 Supreme Court of Canada, 66.

The view taken by the court as to the waters of the Bay of Chaleurs was based upon a statute of the Imperial Parliament, passed in 1851,[1] fixing the boundary between the Provinces of Canada and New Brunswick. This statute traced the boundary between the two provinces right through the Bay of Chaleurs to the Gulf of St. Lawrence.

The same principle as to the internal waters of a bay has been adopted in the United States, a country whose legal system is founded on the English common law. In the case of the *Alleganean* [2] the court held that Chesapeake Bay was part of the territory of the United States; consequently a seizure effected at a spot within the bay, but more than three miles from the shore, was not on the high seas. The court in its decision relied on *R.* v. *Cunningham* [3] and on the Privy Council decision in the Conception Bay case.[4] Legislation had been passed by Congress in 1789, 1790 and 1799 which treated Chesapeake Bay as wholly within the limits of the United States.

In *Dunham* v. *Lamphore*,[5] Shaw C. J. treated the belt of territorial waters as being measured from the line of the shore, but in the case of an inlet narrow enough to be visible from side to side by the naked eye (Lord Hale's " reasonably discerne ") as being measured from a line stretched across from one headland to the other.

In *Manchester* v. *Massachusetts* [6] the Court held that Buzzard Bay was part of Massachusetts. The executive action of the American Administration in 1793 [7] in claiming the release of a British vessel seized by the French in Delaware Bay should also be remembered.

The series of precedents and authorities quoted above, all working back ultimately to Lord Hale's principle that waters *intra fauces terrae* may be within the body of the county, confirm the proposition that the interior waters of a bay are national waters and not territorial waters, but the question of what is for this purpose a bay, that is to say, what body of water *intra fauces terrae* can be so appropriated as to become part of the national territory, must still be considered.

[1] 14 and 15 Vict. c. 63.

[2] *Stetson* v. *United States*; Court of Commissioners of Alabama Claims; 4 Moore's *Int. Arbitrations*, 4333; Scott's *Cases of International Law*, 143.

[3] Bell C.C. 86. [4] (1877) L.R. 2 A.C. 394.

[5] 3 Gray 268, Supreme Court of Massachusetts, 1855. [6] 1890. 139 U.S. 240.

[7] 1 Op. Att. Gen. 32. 1 *American State Papers*, 147.

The antithesis to a bay is open sea. No one seems to have considered that waters ceased to be part of the open sea merely because they bore the name of gulf or bay. The Bay of Bengal, or the Gulf of Oman, vast stretches of water which lack all the characteristics of a defined inlet, have never seriously been alleged not to form part of the open sea. They stand on the same footing as the Gulf of Mexico or the Bay of Biscay. Lord Hale's test of the " reasonable discernement " from shore to shore affords a rough and ready rule which corresponds to the instinctive feeling that to justify a claim that a bay is part of the national territory it must be reasonable in size and must be something which one looks across, *i. e.* it must be an inlet, something more than a mere curvature of the coast.

The question of what is a bay figured largely in the North Atlantic Fisheries Arbitration at the Hague in 1910, but the majority award of the tribunal in that case does not really throw quite so much light on the problem as a cursory examination of the document might suggest.

The question came before the tribunal in this way. Under the treaty of 1818 the United States had renounced the liberty of taking fish on or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within certain limits. The fifth question submitted to the Arbitration Tribunal by the two Governments was " From where must these three marine miles be measured ? " Great Britain contended that the word " bays " was used in the treaty merely as a geographical expression and therefore the renunciation applied to all bays generally. The United States of America, on the other hand, contended that it only applied to bays which were under the territorial sovereignty of Great Britain and that no bay was subject to such sovereignty if it exceeded six marine miles in width at the mouth.

The majority of the tribunal adopted the view that the word " bay " was used merely as a geographical expression irrespective of the territorial sovereignty. They also held that the question what was a bay for this purpose was a question of fact, and that the three marine miles were therefore to be measured from a straight line drawn across the body of water at the place where it ceased to have the configuration and characteristics of a bay. The tribunal, however, realised that an interpretation of the treaty which made its application depend on the answer to a

question of fact in respect of each bay was not going to solve the questions at issue between the two Governments. Acting, therefore, under the powers conferred upon it by the Arbitration agreement the tribunal made certain " recommendations " to the parties for determining the limits of the bays. In respect of eleven large bays (Chaleurs, Miramichi, Egmont, St. Ann's, Fortune, Barrington, Chedabucto, St. Peter's, Mira, Placentia, and St. Mary's) it specified the limit of the bays; in respect of all other bays the three miles were to be measured from a straight line drawn across the bay in the part nearest the entrance at the first point where the width did not exceed ten miles. In fact, the tribunal adopted the rule of the North Sea Convention of 1882.

If the tribunal had adopted the dissenting opinion of M. Drago, the award would have afforded definite guidance as to the bays which should be regarded as part of the national territory. The majority had rejected the contention that the American renunciation could only apply to bays which were subject to British sovereignty, and had also declined to interpret the word " bay " as used by the parties in 1818 by international practice since that date.

M. Drago took a different view. He held that the United States of America could only renounce a " liberty " to fish in a bay which was British and, therefore, considered that in order to be affected by the renunciation contained in Article 1 of the treaty of 1818 the bays must be British. In his opinion British sovereignty had been asserted over three of the bays in question (Conception, Chaleurs and Miramichi); these were to be reckoned among the great historical bays which were admitted to be within the sovereignty of the littoral state. To the other bays he considered that the ten-mile limit applied as a matter of law, and that there was no need to make a recommendation. His view was that the only principle which could be applied was that resulting from the custom and usage of the individual nation concerned, in this case Great Britain, and the practice adopted by Great Britain since 1818 might legitimately be taken into account in determining the meaning with which she used the word " bay " in the treaty.

As the North Atlantic Fisheries decision lays down no rule of general application as to what bays form part of the national territory, it becomes necessary to consider very carefully the

scope of the paragraph in the North Sea Fisheries Convention quoted at the beginning of this article. It is noticeable that though the Convention was limited to the North Sea, Article 2 is quite general in its terms. The fishermen of each country are to enjoy exclusive rights in the three-mile belt along the whole extent of the coasts of their respective countries: then follows the rule for determining the position of the belt in the case of bays. Does this mean that the framers of the Convention regarded Article 2 as declaratory of an existing rule of international law, a rule which was to apply in the case of the North Sea because it was already recognised as generally applicable? The language of the Article suggests it, but the history of its insertion in the Convention makes it fairly clear that the parties only intended to define the exclusive fishery limits in the North Sea.[1]

At the commencement of its proceedings the Conference had adopted as the basis of its discussions a memorandum which had been circulated by the British Government. Her Majesty's Government had wished to avoid any precise definition of territorial waters and to say merely that the Convention was applicable outside the fishery limits of the countries participating, without indicating what those limits were. Other delegations, particularly the French, insisted that the exclusive fishery limits should be defined in precise terms. Ultimately the British delegates, being unable to maintain their original position, agreed to the insertion in the new convention of the corresponding clause in the Anglo-French Convention of 1867. Alterations were made in the first paragraph of the Article and the third paragraph was added, but the second paragraph as to bays is a provision of the abortive Convention of 1867, and was inserted without reference to the fact that the language was appropriate to the instrument drawn up in 1867 and not appropriate to that of 1882. The later instrument applied only to a defined area—the North Sea—whereas the earlier applied generally to the fisheries along the coasts of the respective countries.

The Sea Fisheries Act, 1883, enacted in order to give effect to the Convention of 1882, certainly does not regard Article 2 of the Convention as declaring a general rule of international law. Section 28 defines the exclusive fishery limits of the British Islands as—

[1] The *procès verbaux* of the Conference which drew up the Convention have been published in *Parl. Papers*, Commercial No. 24, 1882. [Cd. 3238.]

" that portion of the seas surrounding the British Islands within which Her Majesty's subjects have by international law the exclusive right of fishing, and where such portion is defined by convention in force between Her Majesty and any foreign State, includes as regards the boats and subjects of that State the portion so defined."

If the rule laid down in Article 2 of the Convention had been regarded as embodying the existing rule of international law, this definition would have been much shorter.

The question whether the rule for bays adopted in Article 2 of the North Sea Convention was intended to be confined to the North Sea or to apply generally is, however, from the British point of view, of relatively small importance. There is no practical divergence between it and the English common law principle enunciated by Lord Hale. The rule merely gives to the existing British doctrine upon the subject precision in application. By prescribing that the belt of territorial waters is to be measured seawards from a line which crosses the bay, the Article recognises that the waters lying within that line are not territorial waters but part of the national territory. By substituting the ten-mile line for the range of " natural discernement " from shore to shore the Article effects but little change, and, so far as any change is made, it was justified by the usage of the nineteenth century.

The ten-mile line for bays had been adopted in the Anglo-French Fishery Convention of 1839, and in the regulations of 1843 between the same countries.[1] It was reproduced in the subsequent unratified Anglo-French Fishery Convention of 1859 and the Convention of 1867. It was these conventions undoubtedly which led the Arbitration Tribunal in 1910 to adopt the ten-mile line for bays in its recommendations to the two Governments as to the limits within which the renunciation of fishing rights by the United States in 1818 was to operate. The ten-mile limit for bays had also been adopted in the Anglo-Danish Fishery Convention of 1901.[2]

It is difficult to be precise as to the respects in which national waters differ from territorial waters because there is no general agreement as to the nature and extent of the rights which a state enjoys over its territorial waters. Many writers of repute, such as Hall, Vattel, Galiani, Martens, Azuni, Hautefeuille and Pistoye and Duverdy, appear to treat those rights as full sovereignty. All that can be argued on the other side will be found

[1] Hertslet's *Treaties and Conventions*, Vol. 5, p. 89, and Vol. 6, p. 416.
[2] Hertslet, *Commercial Treaties*, Vol. XXXIII. p. 425.

in M. de Lapradelle's article in the *Revue Générale de Droit International Public*, Vol. 5, p. 264. There are no British judicial decisions on the point, and when the question came before the Privy Council in the case of *Attorney-General for Canada* v. *Attorney-General for British Columbia*,[1] the Privy Council expressly declined to determine it. For practical purposes, however, there is no doubt that the difference between the two is that foreigners have a right of passage for innocent navigation through territorial waters but enjoy no such right of passage through national waters. There is no scope for the exercise of the right of passage through a land-locked bay. All that it affords is a right of access to the ports situated on its shores, and apart from treaty no state can claim a right of access to the ports of another state.

It is this question of the right of passage which limits the operation of the rule about bays to cases where both shores of the bay are subject to the same sovereign. The umpire in the London Claims Commission of 1853 based his decision in the case of the *Washington* that the Bay of Fundy is not such a bay as was contemplated in the treaty of 1818 between the United States and Great Britain, upon the circumstance that one of the headlands of the Bay of Fundy was in American territory and that ships bound for Passamaquoddy must pass through part of the bay.

The existence of the right of passage must certainly limit the rights of the territorial state in a manner in which these rights are not limited in national waters, but the consideration of the precise extent of the difference so made appertains more to a study of territorial waters than to a study of bays.

One word may perhaps be said as to the right of anchorage. Does the right of passage through territorial waters include the right of anchorage? The answer is probably No. The right of anchorage, so far as it exists, is incident to the right of shelter and the duty of hospitality which obliges a state to open its waters to a foreign vessel seeking shelter in stress of weather or from the perils of the sea; this duty, however, is founded on humanitarian motives and applies equally to national waters.

This view that the right of passage does not include the right of anchorage may seem inconsistent with the Whitstable Fishery cases decided in the House of Lords,[2] but what the court was there

[1] L.R. [1914] A.C. 153.

[2] *Gann* v. *Free Fishers of Whitstable*, 11 H.L. Cases 192; *Forman* v. *Free Fishers of Whitstable* (1869), L.R. 4 H.L., 266.

dealing with was the right of the subject as against the Crown and has no bearing on the question whether the right of passage enjoyed by a foreigner in territorial waters comprises the right of anchorage. It may also seem to be inconsistent with the wording of the last paragraph of Article 2 of the North Sea Fisheries Convention quoted at the beginning of this article, but the scope of the duty of hospitality to a fishing vessel may well be broader than in the case of an ordinary merchant ship. Vessels which fish at night may reasonably ask to be allowed to lie at anchor and rest under the shelter of the coast in the intervals of their fishing.

In conclusion, the rule of international law which may be deduced from the British authorities may be stated somewhat as follows.

The belt of territorial waters is measured from a line which in general is the line of low-water mark. When this line reaches a port, it will pass across from point to point of the outermost works forming the port. When the line reaches a bay it will pass across from shore to shore.

A bay for this purpose means a defined inlet, penetrating into the land, moderate in size and with both shores subject to the same sovereign. An inlet at the mouth of which one can see clearly from shore to shore may be presumed to have been appropriated as part of the national territory and will, therefore, constitute a bay; for working purposes this distance may be taken as ten miles and the line will then pass from headland to headland. In the case of a larger inlet, it lies on the territorial state to establish that it has been appropriated as part of the national territory. Where this is not proved, the line from which the territorial waters are measured will not pass from headland to headland but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice this may be taken as the place where it first narrows to ten miles.

All the waters lying inwards from this base line are national waters and form part of the national territory. They stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seawards of this base line are territorial waters. In territorial waters foreign states are entitled, to the extent recognised by international law, to the exercise of the right of passage. In national waters there is no such right.

ENEMY SHIPS IN PORT AT THE OUTBREAK OF WAR

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I

The judgment of the Judicial Committee of the Privy Council in the cases of *The Blonde*, *Prosper* and *Hercules* [1] delivered by Lord Sumner on the 16th February, 1922, determined, so far as Great Britain is concerned, questions which had, since the outbreak of the war in August, 1914, remained in suspense. The points were whether the Sixth Hague Convention, 1907, relative to the status of enemy ships in port at the outbreak of war, was binding on this country, and, if so, what were the meaning and effect of the first two Articles of that Convention. There were other points in the case relative to the interpretation of certain Articles in the Treaty of Versailles with which this paper is not concerned.

Before discussing this judgment it is proposed to deal shortly with the position of enemy ships in port at the outbreak of war apart from the Hague Convention, and also to consider the question of the Convention as regards other belligerents in the war of 1914–18.

Down to the middle of the nineteenth century enemy ships in port at the outbreak of war, enemy ships entering port after the outbreak of war and enemy ships met at sea in ignorance of the outbreak of war were all liable to capture and condemnation.[2] It was formerly the practice not only to seize enemy vessels in port at the outbreak of war, but also to lay an embargo upon them in expectation of war, so that if war should come they might be confiscated.[3] The commencement of a new practice whereby

[1] 38 T.L.R. 328.

[2] Bonfils-Fauchille, *Droit international public*, § 1399; *Lindo* v. *Rodney*, 2 Doug. 613 n.

[3] J. B. Moore, *International Law*, Digest VII. p. 453; *The Santa Cruz*, 1 C. Rob, 563; *The Boedes Lust*, 5 C. Rob. 245.

enemy ships in port were exempt from capture and were given " days of grace " wherein to depart was inaugurated by Turkey, whose government on declaring war against Russia announced on the 4th October, 1853, that it was not deemed just to place an embargo on Russian merchant vessels, and that they would be warned to go within a period to be fixed to the Black Sea or to the Mediterranean as they chose. Russia made a similar concession to Turkish vessels. Great Britain and France in 1854 gave days of grace to Russian vessels. A similar practice was followed in 1859, 1870, 1877, 1897, 1898 and 1904. The Italian Code for the Mercantile Marine, 1877, recognised the granting of days of grace (Art. 243) and the United States Naval War Code of 1900, which was withdrawn in 1904, proposed a delay of thirty days. In the Turco-Italian War, 1911, neither Power being a party to the Sixth Hague Convention, 1907 (to be subsequently dealt with), Turkey gave no days of grace to Italian ships and condemned those found in her ports. Italy by way of retorsion sequestrated some Turkish ships but subsequently allowed them to leave.[1] In the war between Turkey and the Balkan States Bulgaria, Serbia, Montenegro and Greece, 1912–13, no days of grace were given.[2]

All the foregoing cases of grants of delay were, however, recognised as mitigations of the belligerent right of capture and condemnation; they were given as of grace; but they pointed towards a growing practice of making concession of varying periods of delay. The granting of forty-eight hours' grace to Japanese ships by Russia in 1904 was merely a formal acknowledgment of the existence of the practice.[3]

II

Such was the position in law when the Second Peace Conference met at the Hague in 1907. The Programme for the Conference proposed by the Russian Government in the circular of the 3rd April, 1906, under the third heading was as follows : " Elaboration of a convention regarding the laws and usages of naval warfare concerning . . . the days of grace accorded to merchant-

[1] A. Rispardi-Mirabelli, " La guerre italo-turque," *Revue de Droit international* (2nd Series), Vol. XV. 578.

[2] G. Schramm, *Das Prisenrecht in seiner neuesten Gestalt*, 139.

[3] A. Pearce Higgins, *Hague Peace Conferences*, 301. See also the judgment of Sir Henry Duke, in *The Marie Leonhardt*, 3 B. and C.P.C. at p. 768.

vessels for leaving neutral or enemy ports after the commencement of hostilities," [1] etc., and this was one of the questions referred by the Conference to the Fourth Commission, the Rapporteur of which was M. Henri Fromageot.[2] The result of their deliberations was the Sixth Convention relative to the status of enemy merchant ships at the outbreak of hostilities. The Convention dealt with two cases in which since 1854 relaxation of the old rule of capture had been made, namely enemy merchant ships in an adversary's port at the outbreak of war, and enemy merchant ships entering an adversary's port after, but in ignorance of the outbreak of war. It also dealt with a third case, in regard to which practice had not hitherto so generally provided a restriction on belligerent rights, namely enemy merchant ships met at sea (*en mer*) by an adversary's warship, in ignorance of the outbreak of war.

The Report of the Commission states that the reason for the relaxations of the rules of capture which had been made before 1907 in the first two cases—at present entirely optional—was " to conciliate the interests of commerce with the necessities of war " and even after the outbreak of hostilities " to protect, as widely as possible, operations entered into in good faith and in the course of execution before the war." These words are taken verbatim from the Report to the Emperor of the French on the decree of the 27th March, 1854, which gave days of grace to Russian ships in French ports at the outbreak of the Crimean War, and to those which left Russian ports before the outbreak of war and subsequently entered French ports.[3] The corresponding British Order in Council of the 29th March, 1854, announced a mitigation of belligerent rights in all the three cases before mentioned, and the reason given is simply that " Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and *being desirous to lessen as much as possible the evils thereof*, is pleased " to make the concession therein set forth.[4]

The motives which actuated the High Contracting Powers in concluding the Convention under consideration are stated in the Preamble to be that they were anxious to ensure the security

[1] A. Pearce Higgins, *op. cit.*, 54.

[2] For the *Rapport* see : *Deuxième Conférence internationale de la Paix, La Haye, 15 juin–18 oct.* 1907, *Actes et documents.* Vol. i. 250; *The Reports of the Hague Conference*, ed. J. B. Scott (1917), 582; A. Pearce Higgins, *op. cit.*, 300–307.

[3] Pistoye et Duverdy, *Traité des Prises Maritimes*, Vol. II. 467.

[4] For text of Order in Council see *English Prize Cases* (Roscoe), ii. 239 footnote.

of international commerce against the surprises of war, and wished, in accordance with modern practice, to protect, as far as possible, operations undertaken in good faith and in process of being carried out before the outbreak of hostilities. The Preamble has been referred to as giving a clue to the interpretation of the Convention in several of the cases which had come before British and other Prize Courts.[1]

The following is the text of the operative clauses of the Convention in English.

Art. 1. " When a merchant ship belonging to one of the belligerent powers is at the commencement of hostilities in an enemy port, it is desirable that it should be allowed to depart freely, either immediately, or after a reasonable number of days of grace and to proceed, after being furnished with a pass, direct to its port of destination or to any other port indicated.

" The same rule applies in the case of a ship which has left its last port of departure before the commencement of the war and enters an enemy port in ignorance of the war.

Art. 2. " A merchant ship, which owing to circumstances of ' force majeure ' may have been unable to leave the enemy port during the period contemplated in the preceding article, or which was not allowed to leave, cannot be confiscated.

" The belligerent may only detain it under the obligation of restoring it after the war, without indemnity, or he may requisition it on condition of paying an indemnity.

Art. 3. " Enemy merchant ships which left their last port of departure before the commencement of the war, and are encountered at sea while ignorant of the hostilities cannot be confiscated. They are only liable to be detained under an obligation to restore them after the war without indemnity, or to be requisitioned or even destroyed with indemnity and under the obligation of providing for the safety of the persons as well as the preservation of the papers on board.

" After touching at a port of their own country or at a neutral port, these ships are subject to the laws and customs of naval war.

Art. 4. " Enemy cargo on board the vessels referred to in Articles 1 and 2 is likewise liable to be detained and restored after the war without indemnity, or to be requisitioned on payment of indemnity with the ship or separately.

" The same rule applies in the case of cargo on board the vessels referred to in Article 3.

Art. 5. " The present convention does not affect merchant ships whose build shows that they are intended to be converted into ships of war.

Art. 6. " The provisions of the present convention are only applicable between the contracting powers, and only if all the belligerents are parties to the convention." [2]

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[1] *The Prinz Adalbert and The Kronprinzessin Cecilie*, 2 B. and C. P.C. 70; *The Germania*, 1 *ibid.*, 527, 22 *ibid.*, 365; *The Samsen* (Siam), see *infra*, p. 61, Chinese Prize Court, see *infra*, p. 62.

[2] The translation does not purport to follow the official translation in the British Parliamentary Papers.

III

Of the belligerents in the war of 1914–18 the following either did not sign or did not ratify or accede to the Convention : Bulgaria, Greece, Italy, Montenegro, Serbia, Turkey and the United States. Germany and Russia in ratifying did so under reservation of Article 3, and Article 4, paragraph 2.[1]

Great Britain by Orders in Council of 4th August, 1914,[2] and 12th August, 1914,[3] announced the intention of giving ten days of grace to German and Austrian Merchant Vessels in British ports or entering them after the outbreak of war in ignorance of hostilities, other than cable ships, seagoing ships designed to carry oil fuel, and ships whose tonnage exceeded 5000 tons gross or whose speed was 14 knots or over, on intimation being received within three days that not less favourable treatment would be accorded to British vessels in German and Austrian ports respectively. The information was forthcoming in the case of Austrian ships, but not in the case of the German ships. The Order in Council took effect as regards Austrian vessels, but not as regards German.[4]

Germany, on the 3rd August, 1914, when declaring war on France, stated that she would retain French merchant ships in her ports, but would release them if reciprocity were assured within forty-eight hours. A similar intimation was made to Great Britain, Russia and Belgium.[5]

France gave seven days of grace to German ships save those intended for conversion into ships of war and those which were destined for the public service, and the same period was given to Austrian ships.[6] Belgium gave three days of grace to German ships but they did not avail themselves of the delay. Japan gave them fourteen days.[7]

Italy was not a party to the Convention, but her Mercantile Marine Code (Article 243) provided for the giving of days of grace; she, however, suspended the operation of the Article and announced by decree of the 30th May, 1915, that she would observe the Sixth Hague Convention as regards Austrian ships

[1] W. E. Hall, *International Law* (7th ed.), Appendix II.

[2] *Manual of Emergency Legislation*, 138. [3] *Ibid.*, 98.

[4] *Ibid.*, 142. For further discussion of this question see *infra*, p. 67.

[5] P. Fauchille, *Droit international public*, Vol. II. p. 555 ; *Manual of Emergency Legislation*, 141.

[6] P. Fauchille, *op. cit., loc. cit.* [7] *Ibid.*

so far as the laws, etc., permit, but that all enemy ships in port would be sequestrated. By a decree of June, 1915, confiscation by way of reprisals for unlawful acts of war was threatened.[1] On the 11th March, 1915, another decree was issued requisitioning all merchant ships in port; this was, in fact, directed against German shipping.[2] Italy declared war on Germany on the 28th August, 1916, and on the 1st October, 1916, a decree announced the conversion into an Italian warship of the German yacht *Königin*. The Austrian and German crews on board were repatriated.[3] A decree of the 3rd September, 1916, specified the procedure to be taken by Italians who had suffered in consequence of unlawful acts of war by the enemy. The Italian decree of the 24th June, 1915, did not remain ineffective; the violations of the law of nations by the Germans and Austrians whereby injury was inflicted on Italian citizens were made the subject of an inquiry by a Commission appointed by Decree of the 15th November, 1918, and on the 15th April, 1919, the *Sigmaringen*,[4] a German vessel sequestrated under Article 1 of the Decree of the 30th May, 1915, was condemned and also the other German and Austrian ships and cargoes found in Italian ports at the outbreak of war.[5] The sums realised by the sale of the ships and merchandise, and the sums due for insurance and requisition of ships sunk were used to augment the fund for the payment of indemnities due under Article 1 of the decree of the 24th June, 1915, to those who suffered damage by hostile acts of the enemy contrary to the laws of war.

Brazil broke off relations with Germany on the 11th April, 1917, and shortly afterwards and before declaring war on the 26th October, 1917, seized forty-four German ships which were sheltering in her harbours. The crews were subsequently interned and a large number of the ships were placed at the disposal of France.[6] These vessels were subsequently appropriated by the Brazilian Government by legislative measures.

The action of Portugal on the 23rd February, 1916, in requisi-

[1] *Parl. Papers*, Misc. No. 18 (1915).

[2] As to the rights of neutrals to requisition foreign shipping see J. W. Garner, *International Law and the World War*, Vol. I. 176; C. Ll. Bullock, *infra*, p. 118.

[3] *Revue générale de droit international*, Vol. XXIV. 337–362.

[4] *Gazzetta ufficiale*, 29th April, 1919.

[5] e. g. *The Lily*, *Gazzetta ufficiale*, 9th Sept. 1919.

[6] Mérignhac and Lémonon, *Le Droit des gens et la guerre de 1914–18*, Vol. II. 84; J. W. Garner, *op. cit.*, Vol. I. 178.

tioning German ships which had taken refuge in her ports was followed by a protest and an ultimatum from Germany which on the 9th March ended in a state of war.[1] On the 28th December, 1916, a Portuguese Prize Court condemned the *Ingraben* as being a German ship "suitable" for conversion into a warship, and subsequently proceeded to condemn the other German vessels in port at the outbreak of war.

Siam declared war on Germany and Austria on the 22nd July, 1917, and no days of grace were given. On the 21st September, 1917, a Siamese Prize Court condemned the *Samsen*, a German ship, which had taken refuge in a Siamese port since the 3rd August, 1914, on the ground that the Hague Convention did not protect vessels not set apart for commercial purposes, and it was also added that German violations of the laws of war did not entitle her to claim the benefit of the Convention, and in condemning *Five steam lighters* on the 18th October, 1917, the Court held that Siam was not bound by the Sixth Hague Convention as all the belligerents were not parties to it: Germany having by official intimation to Siam taken the same stand in regard to the Eleventh Hague Convention.[2]

The United States declared war on Germany on the 6th April, 1917, and on Austria on the 9th December, 1917; no days of grace were given to either German or Austrian vessels in American ports. On the 12th May, 1917, a joint Resolution of the Senate and House of Representatives authorised the President to take over the possession and title of any enemy vessel within the jurisdiction, and through the Shipping Board or any Government department to operate any of the vessels. On the 30th June, 1917, the President exercised the authority given and enumerated a list of eighty-seven vessels, including two lighters, of which it was ordered that the possession and title were to be taken over through the U.S. Shipping Board.[3]

Cuba declared war on Germany on the 7th April, 1917, and gave no days of grace to enemy ships in port; and on the 21st August, 1917, the President signed a decree transferring to the

[1] J. Basdevant "La requisition des navires allemands en Portugal," *Revue générale de droit international*, Vol. XXIII. 268.

[2] Clunet, *Journal de droit international*, Vol. XLV. 1316, *ibid.*, Vol. XLVI. 420.

[3] *American Journal of International Law*, Suppl. Oct. 1917 (Vol. XI.), p. 199; C. C. Hyde, *International Law chiefly as interpreted and applied by the United States*, Vol. II. 523.

United States four German steamships which were seized in Cuban ports on the declaration of war.[1]

Turkey and Bulgaria were not parties to the Hague Convention and no days of grace were offered by Great Britain, and British Prize Courts condemned Turkish ships and goods in British ports on the outbreak of war.[2]

China declared war on Germany and Austria on the 14th August, 1917, and at once seized all enemy ships in port and condemned the ships on the ground that they were not in port for the purpose of *bona-fide* trade, and therefore were not within the intention of the Sixth Hague Convention.[3]

IV

We now turn to the position in Great Britain. The first case to come before the Court was the *Chile*,[4] a German sailing-ship which arrived at Cardiff on the 4th August, 1914, in ballast. The Crown in this case asked only for an order for detention, and the Court did not enter into the question whether the Sixth Hague Convention was applicable, nor as to the construction of the first two Articles. The order made in this case, and hereafter referred to as " the Chile Order " was that—

" the President pronounced the said sailing ship *Chile* to have belonged at the time of seizure thereof to enemies of the Crown, and as such to have been lawfully seized by the officers of H.M. Customs at the Port of Cardiff as good and lawful prize and droits and perquisites of H.M. in his office of Admiralty; and thereupon on the application of the Attorney-General for the Crown ordered the said ship to be detained by the Marshal until a further order is issued by the Court. All question of costs reserved; liberty to apply."

This Order does not in all respects follow that prescribed in the Prize Court Rules, 1914 (O. xxviii. Form 53, ii. and iv.) as it omits the words " seized under such circumstances as to be entitled to detention in lieu of confiscation," [5] which are contained therein The propriety of the Order was, however, affirmed by the Privy Council in the *Gutenfels*.[6] The Chile Order was made by British

[1] *American Journal of International Law*, Vol. XI. 865.

[2] *The Eden Hall*, 2 B. and C.P.C. 84; *The Asturian*, 2 *ibid.* 208; *The Futih-jy*, unreported.

[3] *Judgments of the High Prize Court of the Republic of China*, translated by F. T. Chang.

[4] 1 B. and C.P.C. 1.

[5] *Manual of Emergency Legislation*, 331.

[6] 2 B. and C.P.C., 36.

Prize Courts throughout the Empire and by the Courts of Alexandria and Zanzibar in the case of all German and Austrian ships to which no days of grace were allowed. In Egypt where days of grace were accorded to enemy ships, and passes offered, vessels which refused to take advantage thereof were condemned.[1] In the course of the argument in the *Gutenfels* it was submitted by the Crown that Article 2 of the Convention was not obligatory if the days of grace which Article 1 recognises as "desirable" are not given, but on this point, as well as on the question whether the Convention applied to German ships which had taken refuge in a British port to avoid capture by French warships, the Privy Council declined to pass judgment, and in the latter case reversed the judgment of Sir Samuel Evans condemning two German vessels, and made the Chile Order, further application to be made to it.[2] In the *Gutenfels* Lord Wrenbury said :—

"The question is one of law, arising out of an international document involving a reciprocal obligation performable only at the end of the war. If this Board was now to determine this question of construction, Germany might hereafter take a different view, and the performance of the obligation, as a reciprocal obligation, might become impossible." [3]

So also as to the question whether the Convention was operative and binding on Great Britain. Lord Wrenbury said :—

"The respondents (*i. e.* the ship-owners) say that it was. The Law Officers of the Crown have stated in the plainest terms that the British Government abide by the Hague Convention and look to Germany to do the same. The British Government, by the Order in Council of the 4th August, 1914, presently mentioned, acted under the Hague Convention. It is unnecessary to determine whether the Hague Convention applies or not. Their Lordships will assume in favour of the respondents that it does." [4]

Similar statements were made by Sir Samuel Evans, leaving the question of the applicability of the Convention open in regard to the Sixth, Tenth and Eleventh Hague Conventions, though he also raised the further question whether the German Empire or its citizens was precluded in the circumstances of the war from invoking the aid of any of the Hague Conventions.[5]

[1] *The Achaia*, 2 B. and C.P.C., 45.
[2] *The Prinz Adalbert and The Kronprinzessin Cecilie*, 2 B. and C.P.C., 70.
[3] 2 B. and C.P.C. 41.
[4] *Ibid.*
[5] *The Berlin*, 1 B. and C.P.C., 36; *The Möwe*, 1 *ibid.*, 60; *The Ophelia*, 1 *ibid.* 210.

On some few points, however, the British Prize Courts did pass a definite judgment. The term " navire de commerce " in Article 1, was held not to be applicable to a pleasure yacht, as such craft did not come within the intention of the Convention as indicated in the Preamble, not being in port for purposes of a commercial nature.[1] The Privy Council and the Jamaica Prize Court held that the Convention only applied to sea-going craft carrying merchandise from port to port, and finding themselves in an enemy port at the outbreak of war; it therefore had no application to tugs and lighters used in connection with a coaling depôt when the craft had their home in the port in which they were seized.[2] Germany on ratifying the Convention reserved Article 3, which exempts from confiscation merchant ships which left their last port of departure before the commencement of war and are met at sea in ignorance of hostilities, and the Order in Council of the 4th August, 1914, had not granted immunity to such vessels. The inapplicability of this Article to German ships was affirmed in several cases,[3] and similar decisions were given in the French Prize Courts,[4] and the ships were condemned.

The British Prize Court was further called on to decide the meaning of the words " at sea " (*en mer*) in this Article, and also of the words " in an enemy port " (*dans un port ennemi*) in Article 1, and it was held that " port " did not mean fiscal port, but only a port in the ordinary mercantile sense, as a place where ships are in the habit of coming for the purpose of trading or unloading, embarking or disembarking.[5] Similar decisions were given in the Prize Court of Western Australia,[6] and Malta,[7] and also in the German Supreme Prize Court, where the English decisions were cited in the judgment.[8]

In order to obtain the benefit of Article 1, where a ship has left her last port of departure before the commencement of war and enters an enemy port after it has begun, the entry must be

[1] *The Germania*, 1 B. and C.P.C., 527; 2 *ibid.*, 365.

[2] *The Atlas and Lighters*, 2 B. and C.P.C., 470; *The Deutsches Kohlen Depot Gesellschaft* [1919], A.C., 291.

[3] *The Marie Glaeser*, 1 B. and C.P.C., 38; *The Perkeo*, 1 *ibid.*, 136.

[4] *The Porto, Revue générale de droit international*, Vol. XXII. 1. j; *Frieda Mahn*, *ibid.*, 5. j; *Czar Nicolai II.*, *ibid.*, 9. j.

[5] *The Möwe*, 1 B. and C.P.C., 60, captured in the Firth of Forth; *The Belgia*, 1 *ibid.*, 303; 2 *ibid.*, 32, captured in the Bristol Channel between Newport and the Somerset coast.

[6] *The Neuminster.*

[7] *The Erymanthos*, 1 B. and C.P.C., 329.

[8] *The Fenix, American Journal of International Law* (1916), Vol. X. p. 909.

in ignorance of the hostilities. So also under Article 3, ignorance of the existence of war is necessary to entitle a ship met at sea to exemption from capture. No case involving the question of knowledge has come before the English Prize Court, but the Natal [1] and the Alexandria Prize Courts [2] had to consider whether a ship fitted with wireless telegraphic apparatus within reasonable distance of communication with the land or with other vessels can be presumed to possess knowledge of current events of international importance. The question was answered in the affirmative, but it was held that the presumption may be, and, in the two cases referred to was, rebutted by evidence showing that the wireless apparatus was in a defective condition.

Where days of grace have been granted a vessel may be prevented by *force majeure* from taking advantage of them. The Privy Council held that the inability of the master to procure the necessary funds for his voyage was not a case of *force majeure*,[3] and the Belgian Prize Court held that the departure of the officers and crews of German ships in Antwerp, and the consequent absence of the necessary crews was not *force majeure* preventing those ships from departing. But where an Hungarian vessel, in a New South Wales port, to which days of grace had been accorded was deprived of her charts, and a watchman put on board, and no special intimation was made to the master that a pass would be given him, the Privy Council affirmed the decision of the Prize Court of Sydney that he had been prevented from departing by *force majeure*. It was further laid down that when days of grace are accorded, the period ought to be explicit and unambiguous with reference to the party whose opportunity of availing himself of the benefits of the Convention is to be affected by the operation of the Proclamation upon the particular case.[4]

What meaning should be attached to the words of Article 5 which provides that the Convention " does not affect merchant ships whose construction indicates that they are intended to be converted into ships of war " was one on which, before the war, it was thought there would be considerable difficulty.[5] Very few questions, as a fact, arose on this point. Two vessels were

[1] *The Birkenfels*, 23rd Nov. 1914.
[2] *The Gutenfels* (No. 2), 2 B. and C.P.C., 136.
[3] *The Concadoro*, 2 B. and C.P.C., 64.
[4] *The Turul*, 3 B. and C.P.C., 356.
[5] H. Wehberg, *Capture in War on land and sea*, 60; A. Pearce Higgins, *op. cit.*, 305, 306; Pitt Cobbett, *Leading Cases*, Vol. II. 169.

condemned by the Alexandria Prize Court under this Article, after expert evidence had been given which showed that the vessels were specially constructed for the purpose of conversion into armed cruisers, and this evidence was not contested.[1] The decision of the Portuguese Prize Court previously referred to, that vessels "suitable" for conversion were not within the operation of the Convention, appears to be an unwarranted extension of the Article.

V

Under Article 30 of the Armistice of the 11th November, 1918, between the Allied and Associated Powers and Germany, it was agreed that—

"all merchant ships now in German hands belonging to the Allied and Associated Powers shall be restored, without reciprocity, in ports specified by the Allies and the United States."

Article 9 of the Armistice of the 3rd November, 1918, with Austria-Hungary is somewhat similar :—

"All merchant vessels held by Austria-Hungary belonging to the Allied and Associated Powers to be returned."

The British ships in German and Austrian hands, including those which were detained in German ports at the outbreak of war, except a small number which had been requisitioned and sunk to block a channel, were restored under these terms of the Armistice. Nowhere, in either the Armistice or the Peace Treaties, is any mention made of the Hague Convention. It was not until some months after the Treaty of Versailles had been ratified that the British Prize Court was called upon to decide the final fate of the detained German vessels. On the 19th October, 1920, Sir Henry Duke, President of the Prize Court, delivered a reserved judgment in the *Marie Leonhardt*,[2] in which the Crown asked for condemnation of a detained German ship in respect of which the Chile Order had been made, and in the course of the arguments certain correspondence which took place between the British and German Governments after the outbreak of the war was referred to. It has already been stated that in consequence

[1] *The Lützow* (21st Jan. 1915); *The Derfflinger*, affirmed by the Privy Council, 2 B. and C.P.C., 43.

[2] 3 B. and C.P.C., 761.

of the non-receipt from Germany of intimation that not less favourable treatment would be accorded to British ships in German ports than that offered by the Order in Council of the 4th August, 1914, days of grace were not accorded to German ships, and the Chile Order was made. From the correspondence referred to it appeared that the British offer, owing to difficulties of communication between England and Germany on the outbreak of war, had not been received in Berlin in time to enable a reply to be made within the time allowed by it. It was contended by the Crown that this correspondence relating to the application of the Sixth Hague Convention was not conclusive as showing Germany's intention to abide by the Convention, and therefore that the Convention did not come into operation. Furthermore, that Germany, in consequence of her flagrant violations not only of the various Hague Conventions but of other rules of international law, was not entitled to claim the benefit of the Convention, and that Great Britain was entitled by way of retaliation to treat it as not being binding. Counsel for the ship asserted no rights under the Hague Convention or on the diplomatic correspondence; he contended that on August 4th, 1914, all enemy ships in port at the outbreak of war had acquired a right by the customary law of nations to receive days of grace during which they were free to depart. Sir Henry Duke found that apart from international convention no such change in the law as that contended for by Counsel for the ship had been made, that the rule stated in *Lindo v. Rodney* [1] that " upon the declaration of war or hostilities, all the ships of the enemy are detained in our ports, to be confiscated as the property of the enemy, if no reciprocal agreement is made," still held good, and that the correspondence between Great Britain and Germany during the months of August, September and October, 1914, as to the terms on which ships and goods should mutually be released, did not show that a " reciprocal agreement " had been concluded. The point as to retaliation therefore did not arise. He condemned the ship. Though notice of appeal was given, it was abandoned.

Meantime a large number of other German vessels were condemned, in many cases without argument, but in the cases of *The Blonde*, *The Hercules* and *The Prosper*,[2] vessels owned by citizens of Dantzig who lost their German nationality immediately the Treaty of Versailles came into operation, and who therefore

[1] 2 Doug. at p. 614 *a*.

[2] 3 B. and C.P.C., 875.

claimed to be in a better position than if they had remained German subjects, the question of the correspondence between Great Britain and Germany, which had been of secondary importance in the *Marie Leonhardt*, was dealt with in argument; the applicability and meaning of the Hague Convention was not argued. *The Blonde* and *The Hercules* had been requisitioned by the Crown, and lost while under requisition—*The Blonde* by grounding off Flamborough Head, and *The Hercules* through being sunk by an enemy torpedo. The owners claimed the appraised values of these ships on requisition for the Admiralty and the delivery of *The Prosper* under the terms of Article 2 of the Convention. Sir Henry Duke rejected the claims of the citizens of Dantzig to any favoured position over that of other German citizens whose ships had been detained and requisitioned, and reaffirmed his judgment in the *Marie Leonhardt*. From this judgment the owner appealed to the Privy Council, and the decision of this Court, consisting of Lord Sumner, Lord Parmoor and Sir Arthur Channel, was delivered by Lord Sumner on the 10th February, 1922. The Court affirmed the judgment of the President on the position of the citizens of Dantzig. Lord Sumner then dealt with the principal point, namely the claim of the appellants to the benefit of the Sixth Hague Convention, which was fully argued on the appeal, or in the alternative, of a supposed agreement to the like effect, arrived at *ad hoc* by Great Britain and Germany in the early months of the war. The Crown denied the applicability of the Convention, firstly for want of ratification by all the belligerents, and secondly because Article 2 would only apply if Great Britain had put Article 1 in force, which was never done. As to the supposed agreement *ad hoc*, the Crown argued that the negotiations were entered into for other purposes and further that they broke down without any conclusion.

It is not proposed to analyse in detail the whole of this remarkable judgment, particularly those portions which deal with reparations and other provisions of the Treaty of Versailles; but with the subject of the Hague Convention it will be necessary to deal in detail, as well as with the retaliatory argument which, it will have been seen, was a factor which weighed with some of the other Prize Courts whose decisions have already been cited.

(*a*) As regards the correspondence between Great Britain and Germany, Lord Sumner pointed out that logically the first

question to be considered was whether it was entered upon or was pursued as a negotiation intended to lead to a new international agreement at all. In their Lordships' opinion, the sole object of the two Powers was to ascertain whether, and in what way, effect would be given to the old agreement, namely, the Sixth Hague Convention, and was not to enter into a new agreement, dealing with the same subject and tending to the same effect.

(*b*) As to the results of the correspondence, it was held that the British Government was satisfied that there existed such an intention on the part of the German Government to observe the Convention reciprocally as justified them in proceeding publicly to observe it, and hence the orders of the Prize Court were made at the instance of the Crown, which were always regarded as being framed to carry out the obligations of the Convention. It was further added that the German Government had strong material interest in continuing to execute the Convention, and was unlikely to intend to abandon or to desire to forfeit the ultimate advantage which its observance would assure.

(*c*) In what did the obligations of the Convention consist according to its terms? The first point discussed was Article 6,

"the provisions of the present Convention do not apply except between the contracting Powers, and then only if all the belligerents are parties to the Convention."

Referring to the French text for the last part of the sentence, "et seulement si les belligérants sont tous parties à la Convention," it was suggested by Lord Sumner that there may be significance in the different position in the sentence occupied by the respective words "all" and "tous," and the question was raised whether, as Germany had not declared war on Serbia, who was not a party to the Convention, at the time the ships were detained, and Serbia had not then formally become an ally of Great Britain, Serbia was a belligerent in such a sense that her failure to ratify the Convention prevented its being applicable as between Great Britain and Germany in the matter of the ships in question. Several other points under this head were raised, but their Lordships did not find it necessary to answer the questions, because whether the objection was one which could be successfully raised or not, it was held that it was one which could be, and in fact was, waived by the British Government, and days

of grace were in fact allowed to Austrian ships, Austria being at war with Serbia.

" The Chile Order was wholly inept if the Convention had and could have no application, and the Crown should have applied to the Court not for leave to requisition, but for a decree of condemnation."

The acquiescence of the Crown in numerous orders in that form, the statements of the Attorney-General in the *Gutenfels* [1] and *Deutsches Kohlen Depot Gesellschaft*,[2] and the fact that whilst hostilities lasted condemnation was not asked for the detained ships, was conclusive to show that any right to rely on Article 6 had been waived.

(*d*) What is the meaning of Articles 1 and 2 of the Convention ? Before answering this question Lord Sumner laid down certain broad canons for the interpretation of international instruments, in which he referred to the conditions of those negotiations which necessarily involved compromises which were embodied in them, so that it would be unreasonable in the circumstances to expect to find in them " nicety of scholarship or exactitude of literary idiom." Where broad principles are laid down and the Powers have to take the measures for their execution, great precision is not to be expected, and even incomplete provisions expressed without much detail or sometimes only in outline are not to be rejected. It is necessary to discover and give effect to " all the beneficent intentions embodied in such instruments which their general tenor indicates," and it is not to be supposed that any Power—

" will seek to escape its obligations by a quibbling interpretation, by a merely pedantic adherence to particular words, or by emphasising the absence of express words, where the sense to be implied from the purport of the Convention is reasonably plain. Least of all can it be supposed that His Majesty's Government could have become parties to such an instrument in any narrow sense, such as would reserve for them future loopholes of escape from its general scope."

With these observations may be compared the similar views expounded by Dr. Lushington in several of the judgments in the Crimean War, where the British Order in Council already referred to was pleaded by owners of captured Russian vessels. In the case of *The Fenix* or *Phoenix* [3] he said that wherever a Government, by a public document, relaxes the severity of belligerent

[1] [1916], 2 A.C. at p. 115. [2] [1919], A.C. 291.
[3] Spinks Rep. 1 ; *English Prize Cases*, Vol. II. 230.

rights, it ought to be taken in favour of the party for whom it is intended, and that a liberal construction should be put upon it. If the words of the document are capable of two constructions, the one most favourable to the belligerent party in whose favour the document is issued ought to be adopted. Again, in the *Argo* [1] he laid it down that all relaxation of belligerent rights emanating from the Government of a country should receive as liberal a construction as the terms of those documents would admit of. The Supreme Court of the United States cited these two cases when dealing with the Proclamation of President McKinley of the 26th April, 1898, announcing relaxations of belligerent rights in regard to Spanish merchant vessels in American ports at the outbreak of war, and accepted the doctrine laid down as being the proper and correct principles to be applied in interpreting such a document.[2]

Returning now to Lord Sumner's judgment, he proceeded to apply the principles laid down to Articles 1 and 2 of the Convention. The contention advanced by the Crown that Article 2 had no operation unless and until the days of grace which Article 1 recognises as " desirable " were granted, was rejected.

" To say that the compact expressed in Article 2 has been providently entered into in case two belligerents should reciprocally grant days of grace under Article 1, but that until that event happens it is a mere foretaste of things to come, is to attenuate this Convention to the very verge of annulling it. It is all the more unworthy of such an occasion to place so narrow a meaning on the Article, because the length and character of the opportunity for departing in peace, rests entirely with the grantor of it."

Furthermore, Articles 3 and 4 placed the matter beyond doubt, and the fact of the reservation by Germany of Article 3 was quite consistent with the adoption of the rest of it.

" Their Lordships, therefore, think it clear that in effect this Convention says : ' Ships which find themselves at the outbreak of war in an enemy port, shall in no case be condemned, if they are not allowed to leave or if they unavoidably overstay their days of grace; but it would be better that they should always be allowed to leave, with or without days of grace.' In effect, while Article 1 is only optional, Article 2 is obligatory. They reject the construction, which makes the prohibition upon confiscation depend on a prior election to do what Article 1 desiderates, but does not require."

It is believed that this view represents the practically unanimous

[1] Spinks 52; *English Prize Cases*, Vol II. 294.

[2] *The Buena Ventura*, 175, U.S. Rep. 384, Judgment of Peckham J. Cp. also the dissenting judgment of White J. in *The Pedro*, 175 U.S. Rep. 354.

opinion of writers on international law as to the meaning of these Articles.[1]

(*e*) But the further question remained. Assuming that the Hague Convention was binding in the early stages of the war, it was argued that Germany had by her conduct given this country the right to refuse to be bound any further by its terms so far as German ships are concerned. It appears that the German Government in 1915, instructed its diplomatic officials in Spain to inform the owners of detained ships of their arrival in Spanish ports when navigating under requisition. The object seems to have been to give the owners the opportunity of taking proceedings in Spanish Courts for recovering possession, but there was no evidence that any proceedings were taken. Again, the Circular to the King of Siam before referred to was cited as evidence of the want of binding-force of the Convention by reason of its non-ratification by all the belligerents. Neither of these points was held by the Court to be of weight. Great stress was, however, laid by the Crown on the—

"many outrageous and indefensible measures adopted by Germany during the war, especially her defiance of the provisions of the Hague Conventions applicable, which, it was urged, amounted to an intimation that she intended to repudiate all obligations, and especially all conventional ones, as to the conduct of the war, and thus gave to Great Britain the right to treat herself as released from her correlative obligations under the Sixth Hague Convention."

Lord Sumner considered that there were two flaws in this argument: (1) Because Germany had flagrantly disregarded a convention to her disadvantage, it did not follow that she intended to repudiate one on the observance of which she stood to gain in the long run, and as a fact she had remained in a position to carry out the terms of the Convention down to the Armistice. On this it may be observed that it certainly seems paradoxical that the breach of nearly all the provisions of the other Hague Conventions except the Sixth by the Germans could not be taken into account in regard to their observance of the terms of the only one which it was to their advantage to observe. Each Convention is, however, separate and distinct from the other, and no two Conventions have been ratified by the same States.

[1] J. Westlake, *International Law, War*, 44; L. Oppenheim, *International Law* (3rd ed.), Vol. II. § 102; T. J. Lawrence, *International Law*, p. 338; C. Dupuis, *Droit de la Guerre maritime* (1911), 167–9; A. Pearce Higgins, *op. cit.*, 303–307; P. Fauchille, *op. cit.*, Vol. II. § 1400; F. Despagnet, *Droit international public* (4th ed.), 955; G. Schramm, *op. cit.*, 134.

The Final Act of the Conference of 1907, after enumerating the Conventions and Declaration annexed to it, says: "These Conventions and this Declaration shall form as many separate Acts." (2) Great Britain had not accepted the repudiation, and had not given notice that she regarded the Convention as no longer binding. This was certainly a very narrow and municipal way of looking at the question, and the Court preferred to rely on a wider ground, namely, that it was not the function of a Prize Court as such—

"to be a censor of the general conduct of a belligerent, apart from his dealings in the particular matters which come before the Court, or to sanction disregard of solemn obligations by one belligerent, because it reprehends the whole behaviour of the other. Reprisals afford a legitimate mode of challenging and restraining misconduct, to which, when confined within recognised limits and embodied in due form, a Court of Prize is bound to give effect."

In taking their stand on these principles the Privy Council has the support of Chief Justice Marshall, who in the *Nereide* [1] declared that—

"reciprocating to the subjects of a nation, or retaliating on them its unjust proceedings towards our citizens, is a political not a legal measure. . . . If it be the will of the Government to apply to Spain any rule respecting captures which Spain is supposed to apply to us, the Government will manifest that will by passing an act for the purpose. Till such an act be passed, the Court is bound by the law of nations, which is part of the law of the land."

The Privy Council in its judgments in the *Zamora*,[2] the *Stigstad* [3] and the *Leonora* [4] has elucidated the whole subject of retaliation in naval warfare in a more thorough manner than it had ever before been done. The wrongful acts of the Germans might well have been a valid ground for Great Britain refusing to be bound by the Sixth Hague Convention, but though Orders in Council had been made, and retaliatory measures enforced and upheld by the Privy Council as being in accordance with the Law of Nations, the Executive had taken no such steps to denounce this Convention. This might have been done by the Treaty of Versailles, but there are no provisions therein which expressly deal with the detained ships. It is believed that attempts were made to obtain the insertion of Clauses expressly dealing with them, and refusing any claims either to restitution or compensation, but the fact remained that neither by Order in Council nor by

[1] 9 Cranch, 388.
[2] 2 B. and C.P.C., 1.
[3] 3 B. and C.P.C., 347.
[4] 3 B. and C.P.C., 385.

Treaty had the application of the Sixth Hague Convention been denied.

(*f*) The Convention having been held to be binding, and the meaning of Articles 1 and 2 explained, there remained the question of its application to the three ships. The second Article, giving the belligerent the right to detain "under an obligation of restoring it after the war without compensation" proceeds, "or he may requisition it on condition of paying compensation." If the ship is detained, the Convention imposes no duty on the belligerent to provide for her safety or to effect repairs; that was the view of the Court. The vessel has been detained at her owner's risk. There is nothing stipulated as to payment of freight or of compensation for the use of the ship while under requisition. Two of the ships had been lost; one by an illegitimate act of war on the part of the Germans, and yet, "paradoxically," as Lord Sumner said, the British Government was liable for the appraised value on their requisition. This is a very strict and literal interpretation of the Article in question, and if the Crown was accused by the Court of a pedantic interpretation of the Convention, the Court appeared to lay itself open to a similar charge. Would their Lordships hold that a belligerent Government was under no liability in respect of payment for the loss of neutral cargo on an enemy vessel which had been "illegally" sunk, as were hundreds of vessels during the late war by German submarines? The condition as to paying compensation would be frustrated, said Lord Sumner "if, though the obligations of the Convention had not been terminated, neither ship nor compensation were forthcoming." But where the illegal act of one contracting party frustrates the performance of the Convention by the other, is not the latter discharged from the performance on his side?

(*g*) There was a further point with which the Court dealt, namely, the meaning of the term requisition. It had been suggested that if the requisitioning took place, other than a "temporary" requisition under Rule 6 of Order XXIX. of the Prize Rules, the substitution of the appraised value was definitive, and no order could be made to take the vessel out of the possession of the Admiralty.[1] The Privy Council did not accept this view

[1] In the *Germania*, *No.* 2 (3 B. and C.P.C., 130), the Privy Council affirmed the decision of Cullen, C. J. of the Supreme Court of New South Wales that when an enemy ship has been requisitioned, the date of the delivery of the ship by the Marshal of the Court is the proper date for determining the value of the ship under Order XXIX.

of the meaning of requisitioning, which in their opinion meant requisition for the use of His Majesty (including consumption in the case of goods whose normal use consists in using them up), and to determine otherwise would be to " confound a thing requisitioned for use with a thing acquired for the purpose of sale." If, therefore, the thing requisitioned under the terms of the Convention is in existence at the end of the war, it is to be returned to the claimant. This interpretation of the use of the term appears to be in harmony with the intention of the draftsmen of the Convention, as evidenced by the Report of M. Fromageot.

VI

With the subsequent portion of the judgment, and the relation of the terms of the Treaty of Versailles to enemy merchant ships, it is not proposed to deal; but a general summary of the position of vessels in enemy ports at the outbreak of war (1) apart from, and (2) under the Sixth Hague Convention, may now be attempted.

(1) Where the Hague Convention is not binding on the belligerents, either under Article 6 or where neither of two belligerents has ratified the Convention, the former rules of confiscation of enemy vessels in the ports of an adversary at the outbreak of war, of such ships entering such ports after the outbreak of war, and of those met at sea in ignorance of the outbreak of war, still hold good. There is no rule of international law, apart from the Convention, requiring the giving of " days of grace " to enemy vessels in port or entering port after the outbreak of war. The United States refused to sign or to ratify the Sixth Hague Convention, on the ground that the Convention questioned a custom which seemed generally established, and that its adoption would seem to sanction less liberal and enlightened practice.[1] The American delegation to the Second Hague Conference, in its report to the President, based its recommendation against accepting the Convention on the decision of the Supreme Court in the case of the *Buena Ventura*,[2] which it cited in support of the view that the privilege enjoyed by enemy merchant vessels in port at the outbreak of war " had acquired

[1] J. B. Scott, *American Journal of International Law*, Vol. II. 270.

[2] 175 U.S. Rep., 384.

such international force as to place it in the category of obligations." It would seem that it attached to its decision a significance to which it was hardly entitled.[1] The Government of the United States, however, instead of leaving the question of condemnation of the enemy vessels in port to the decision of the Prize Courts, took the somewhat unusual method of appropriating them by legislative enactment.[2]

(2) The meaning of Articles 1 and 2 of the Sixth Hague Convention regarding " days of grace " and the immunity from condemnation of enemy ships in port at the outbreak of war, or entering port after the outbreak of war, but in ignorance of hostilities, as expressed by Lord Sumner, is believed to be the true and correct view; [3] it is the view which is generally taken by all writers on the subject. Where days of grace are given to ships in an enemy port, and an effective pass is offered, and for reasons other than *force majeure* the masters do not avail themselves of the permission to leave, it seems clear that the old rule of condemnation can be properly enforced. The Convention introduces an important restriction on the right of belligerent capture, but it leaves to the State in whose ports enemy vessels are found, the right of refusing to grant them leave to depart, or of restricting the permission to such vessels as it may seem good to it, as was done by the British Orders in Council of the 4th and 12th August, 1914. If enemy ships are not allowed to depart, they may be detained without any compensation for their deterioration, and they lie at the owner's risk for the period of the war; or they may be requisitioned for use on condition of paying an indemnity if they are not in existence at the end of the war. There is no question of indemnity by reason of the immobilisation of the vessels if they are not requisitioned. In permitting the requisition of the vessels, the Convention recognises the impossibility of prescribing for belligerents an abstention which is not imposed on them in land warfare as regards property susceptible of employment in war. The French delegation at the Hague Conference proposed to specify that the indemnity should be due in case of requisition, in accordance with the territorial laws in force. The owners of enemy ships would then have been indemnified in the same measure as the owners of national ships.

[1] C. C. Hyde, *op. cit.*, ii. 517 n.
[2] Cf. the judgment of Lord Stowell in the *Victoria*, Edwards, 97.
[3] *Supra*, p. 68.

Such assimilation, as Professor Charles Dupuis points out, would be excessive; the local law takes into account in fixing the indemnity due to nationals, the loss that may result to them from the deprivation of the use of the requisitioned ship, but there is no occasion to consider this in relation to enemy owners of ships, since, by virtue of the state of war, the belligerent has the right to prevent them from sailing the seas. The measure of the indemnity is not fixed by the Convention, but the Report of the Commission states that it must cover the loss proved by the claimant to have been caused by the requisition. This does not include loss of freight.[1] The provisions relating to requisition would be improved if fuller explanation were afforded of the meaning of the term, and as to the nature and method of calculation of the indemnity to be accorded where return of the detained and requisitioned ship is impossible at the end of hostilities; the unqualified undertaking to return the ship or pay the indemnity should also be modified in the sense previously suggested.

The canons of construction laid down by the Privy Council do not appear to have been always fully complied with in applying them to the Convention by British and other Prize Courts. It is believed that the treatment of pleasure yachts as being of a class other than " navires de commerce " is a restriction on the intention of the framers of the Convention, and that the term was used in the Convention as opposed to " bâtiments de guerre " in Article 5. Though the preamble of the Convention declares that it is entered into in order to ensure the freedom of international commerce, " commerce " does not necessarily mean trade, any more than " trading " with the enemy signifies buying or selling. The Report of M. Fromageot appears to bear out this construction, for he says " it has appeared preferable not to specify that the delay shall be granted to allow the loading or unloading, in order not to limit its enjoyment to these commercial operations alone." [2]

The restriction of the Convention to vessels engaged on a port to port voyage, appears, however, to be in accord with the principles of the Convention, and the meaning of the term port as given in the British and German decisions previously cited is in accord with the rule *verbis plane expressis omnino standum est*.[3] The condemnation of vessels which took refuge in a neutral

[1] Ch. Dupuis, *Le Droit de la Guerre maritime* (1911), p. 169.
[2] *Parl. Papers*, Misc. No. 4 (1908), p. 191.
[3] *The Fenix*, 2 E.P.C., at 244.

port, and subsequently found the port to be an enemy one, though intelligible in the circumstances of the war,[1] was a narrow construction and was not adopted by the British Prize Courts.[2] A more safe, though technical ground for their condemnation by many of the States which adopted this course would have been reliance on Article 6, that the Convention was not binding on them. The position taken by Italy seems to have been logical, and valid in accordance with the views as to retaliation enunciated by the British Prize Court.

The Convention has made a real change in the law of naval warfare to the detriment of belligerent rights, in the general interest of international intercourse and trade. The exemption from the operation of the Convention of vessels whose construction indicates that they were intended for conversion into warships has, generally speaking, been interpreted in a manner which does not seriously diminish the ambit of its operations.

As regards the granting of days of grace in the future, the conduct of the late war showed the immense value to a belligerent of a fleet of merchant vessels which could be used not only for the purpose of trade and the maintenance of import of commodities of all kinds, but also for use as auxiliaries to the fighting fleet; the granting or withholding of " days of grace " will, therefore, remain in the future, as it was in the past, a matter in which each belligerent will be guided by the supreme need of safeguarding national interests.

[1] P. Fauchille, *op. cit.*, ii. p. 556.
[2] *The Prinz Adalbert*, 2 B. and C.P.C., 70.

AN INTERNATIONAL CRIMINAL COURT AND THE RESOLUTIONS OF THE COMMITTEE OF JURISTS

By LORD PHILLIMORE

At the close of the meeting of the Committee of Jurists summoned to prepare the project for the Permanent Court of International Justice, which sat from June 16 to July 24, 1920, three Resolutions or Voeux were appended—Resolutions which, by reason of the character of their proposers and the unanimity of acceptance by the Committee, would seem to deserve more consideration than has been accorded to them at present by the members of the Council or by the members of the Assembly.

"Before breaking up, the Committee unanimously adopted the three following Resolutions, all of which are closely associated with the object of its labours, and of which the two first are addressed to the Council of the League of Nations.

First Resolution.

"The Advisory Committee of Jurists assembled at the Hague to prepare the constituent Statute of a Permanent Court of International Justice;

"Convinced that the extension of the sway of justice and the development of international jurisdictions are urgently required to ensure the security of States and well-being of the Nations;

"Recommend that :—

"I. A new interstate Conference, to carry on the work of the two first Conferences at the Hague, should be called as soon as possible for the purpose of :—

"1. Re-establishing the existing rules of the Law of Nations, more especially, and in the first place, those affected by the events of the recent War;

"2. Formulating and approving the modifications and additions rendered necessary or advisable by the War, and by the changes in the conditions of international life following upon this great struggle;

"3. Reconciling divergent opinions, and bringing about a general understanding concerning the rules which have been the subject of controversy;

"4. Giving special consideration to those points, which are not at the present time adequately provided for, and of which a definite settlement by general agreement is required in the interests of international justice.

"II. That the Institute of International Law, the American Institute of International Law, the Union juridique international, the International Law

Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realisation of this work.

" III. That the new Conference should be called the Conference for the advancement of international law.

" IV. That this Conference should be followed by periodical similar Conferences, at intervals sufficiently short to enable the work undertaken to be continued, in so far as it may be incomplete, with every prospect of success."

Second Resolution.

" The Advisory Committee of Jurists assembled at the Hague to prepare the constituent Statute of a Permanent Court of International Justice;

" Having had laid before it by its President a proposition for the establishment for the future, of a High Court of International Justice;

" Recognising the great importance of this proposition;

" Recommends it to the consideration of the Nations.

" This proposition is conceived as follows :—

" Art. 1 : A High Court of International Justice is hereby established.

" Art. 2 : This Court shall be composed of one Member for each State, to be chosen by the group of Delegates of each State on the Court of Arbitration.

" Art. 3 : The High Court of International Justice shall be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations.

" Art. 4 : The Court shall have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence. It shall formulate its own rules of procedure."

Third Resolution.

" The Advisory Committee of Jurists assembled at the Hague to prepare the constituent Statute of a Permanent Court of International Justice;

" Gladly takes this opportunity of recording a wish that the Academy of International Law, founded at the Hague in 1913, and of which the work has been suspended owing to circumstances, may be set in operation in as near a future as possible, side by side with the Permanent Court of International Justice and the Permanent Court of Arbitration, at the Peace Palace at the Hague."

The first was proposed by the Hon. Elihu Root and seconded by the President, Baron Descamps. The second was proposed by Baron Descamps, and the third by Dr. Loder, who has since been elected President of the Court. The first and third are proposals for the better knowledge and improvement of international law. For the moment I pass to the second.

If the Second Voeu were put into practice, it would effect at once a remarkable change in international law. It was first

introduced to the notice of the Committee at one of the earliest meetings on June 18, and after the preliminary discussion which it shortly afterwards received, was reproduced in more complete form, and finally passed at the close of the sessions of the Conference.

Baron Descamps explained that he had taken the idea of the procedure from the constitution of his country, Belgium, which provides that the "Chamber of Representatives may bring charges against the Ministers, and bring them to trial before the Court of Cassation, which is expressly invested with power to define the offences and determine the punishment"—an idea perhaps borrowed from, and not dissimilar to, the procedure of impeachment in Great Britain.

Baron Descamps, as will be seen, gave his suggestions only in outline, but they may end by being very fruitful. In the course of the discussion the present writer ventured to analyse crimes against the law of nations into three classes—crimes committed in time of peace, the crime of declaring an unrighteous war, and crimes committed in time of war. And he ventured to say, and in this he was generally supported—at any rate he received the support of Mr. Root—that for the first class an international tribunal was not required.

A crime committed by an individual against a State of which he is not a subject, or against a citizen of that State, becomes a subject of representation by the injured State to the State to which the wrongdoer belongs. That State either adopts the act of its subject, in which event a *casus belli* arises, or it repudiates the act; and the only effectual form of repudiation is by punishment of the offender, which can be administered more speedily, more effectively, and probably more sternly by a sovereign State against one of its own subjects than could be done by an international court of criminal justice.

As to the crime of declaring an unrighteous war, Grotius gives some countenance to the view that those who have started an unjust war may be the subject of personal punishment:—

"No mercy is sometimes shown to those who are taken prisoners or have surrendered, or their surrender on the condition that their lives should be spared is not accepted, if they have continued in arms notwithstanding that they knew the war to be an unjust one . . . or if they have broken faith or any other rule of the law of nations. . . ." [1]

[1] *De Jure Belli et Pacis*, Lib. III. cap. 11, §§ 5, 16. See also Cap. 7.

I refer to this passage in the last chapter of my work on *Three Centuries of Treaties of Peace*,[1] where I mention the justification for the captivity of the First Napoleon at St. Helena and observe that his fate was one which might overtake "other sovereigns, presidents and ministers." Unless, however, in cases of personal autocratic government, it will be difficult to apply this principle. Despotic monarchs and some dictators in past time in Latin America who, though nominally presidents, have been, as Viscount Bryce points out in his last work on *Democracy*, in reality autocrats, might become the subject of personal procedure and punishment.

"Hang the Kaiser" was at one time a supposed popular cry. To the writer it seemed as unjust as impolitic, and recent publications have shown, what wiser men always anticipated, how complex were the forces, how numerous were the persons, which and who contributed to the declaration of war by Germany and her invasion of neutral Belgium and Luxembourg.

The Czar of Russia was reckoned an autocrat, but the recent *Life of Lord Salisbury* shows how much his hand was forced by his subjects when he entered into the war with Turkey in 1877 and made the Treaty of San Stefano in 1878.

If such a court were established as is suggested, it might be well, if only as a deterrent, to confer upon it jurisdiction in these cases, but it is hardly likely that such a jurisdiction would often be exercised.

Lastly, as to crimes committed in the course of war—that is, by the subjects of one enemy State against those of another, acts of outrage forbidden by the laws and usages of war. These seem peculiarly matters for an international court of criminal justice. It is true that for such crimes a belligerent State may go so far as to punish its own subjects, and the German Reich, after no doubt much passive resistance, has brought to trial some of those who were delated to it by the Allies as the worst of criminals, and the national court before which they have been brought has, according to the best opinion, tried them very fairly, convicted those who upon the facts ought to have been convicted, and inflicted punishment which, though it seems to the mind of the Allies insufficient, is said nevertheless in its effect upon a German, particularly if he was an officer, to be pretty severe. Sometimes, too, the offender can be caught in the

[1] Pp. 162, 163.

State which he has offended, and can be punished by the tribunals of that State. But here the difficulty may arise that such punishment may be deemed unjust by his fellow-citizens and may lead to reprisals if the state of war is still continued.

On the whole as it will nearly always happen that the complaining State, if it has to proceed before the tribunals of the other State, will not think that it gets its full measure of justice, while if it proceeds before its own tribunals it will be suspected of injustice or hardship, it would be better that there should be an international high court of justice which could exercise criminal jurisdiction in such cases.

Objection has been taken that the court would have no law to work upon; and it is true that the hitherto declared law does not cover all the cases of war crime that one might conceive. But since the two Conferences of the Hague in 1899 and 1907, there have been written rules regarding the conduct of war on land and sea, and with regard to the position of prisoners and the subject of occupied territories, disobedience to which might well be considered to form a crime of which the court might by analogy to proceedings in impeachment cases settle for itself the proper punishment. And there are other national Conventions, such as the Declaration of St. Petersburg concerning explosive bullets (1868) and the original Geneva Convention (1864) and the application of the rules and principles of that convention to hospital ships, so often infringed by the Germans in the late war, which might be enforced by bringing the accused before an international criminal court. And there are some crimes made such by the common law of nations, firing upon the white flag, the misuse of the white flag, and so forth.

There is, it is true, another way of treating crimes of this kind when they occur at sea. They may be made piracy—that is, they may be treated as putting the offenders in the position of pirates, who, whatever their nationality, are justiciable by the courts exercising Admiralty jurisdiction of any nation which can catch them. This is what, upon the proposal of Mr. Root, has been agreed upon by the recent Washington Conference, with respect to certain defined offences at sea, and the agreement is no doubt useful, at least as setting up a standard of justice and humanity.

It is, however, open to two objections. In the first place, this conventional piracy only operates for the subjects of nations

who form parties to the convention; it leaves, for instance, the Germans, who are not as yet parties, though all States are invited to accede, just as they were. Secondly, unless the trial take place, as perhaps it might sometimes, in the court of a neutral State, there will be the feeling already indicated that either its own State is too lenient or its enemy State too harsh to the accused. Anyhow it does not cover war crimes on land.

No doubt the body of judges proposed by Baron Descamps would be so large as to be unwieldy—it might run to fifty or more judges. But there is no apparent reason why this number should not be reduced by a form of election similar to that which has come into operation for the corresponding civil court, the Permanent Court of International Justice.

A matter which would require much thought is the execution of judgments rendered by an international criminal court. If the sentence be of death, who is to be the executioner? The international court must sit in some country or other; and then will the national law permit an execution except in sentences by its own courts and by its own officers? Or is the nation to be called upon to put its services at the disposal of the international court? If the sentence is of imprisonment, where is the prison? It might perhaps be made a term of the convention establishing the court that each State should agree to deal with its own peccant subjects. It could fine them and perhaps imprison them, as the court should direct, but it would be difficult to get it to agree to an execution by its own officers, and if it did agree, to get it to carry out its agreement.

Unfortunately, however, scant and summary consideration was given by the Assembly of the League to this proposal. The Assembly at its first meeting at Geneva in December 1920 adopted a recommendation of its Committee which was expressed in the following words :—

" In the second recommendation it is proposed to set up an International Court of Criminal Justice, the duties of which would be to punish international criminals. The Committee is of opinion that it would be useless to establish side by side with the Court of International Justice another Criminal Court, and that it is best to entrust criminal cases to the ordinary tribunals, as is at present the custom in international procedure. If crimes of this kind should in future be brought within the scope of an international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature."

This summary disposal is, in the opinion of the writer, to be regretted. No doubt it ought not to be held to preclude further discussion. It may be that the Committee and the Assembly, acting at a period so shortly after the termination of the war, may have been afraid that the court would be used retrospectively for cases arising out of that war. It is clear that if it would be unwise to set up a court *ad hoc* for criminal trials, it would be *a fortiori* unwise in such a delicate matter as that of trying crimes against international law. But now that we have reached the year 1922 any danger of a court being set up with such retrospective jurisdiction may be considered as past. While, on the other hand, the same considerations would indicate how important it is that such a court, if one is ever to be constructed, should be set up in a time of peace and security. This matter ought not to be dropped by those who are interested in the development of international law.

With regard to the Third Voeu, there was little that the Assembly could do. It may be taken to have expressed its sympathy with it—in fact everyone sympathises with the idea that there should be an academy of international law—and the Carnegie Fund was in the course of providing an endowment which would have produced a result before now if it had not been for the war. The writer is glad to know that the ranks of the Council of the Academy have been completed and reinforced, and that the administration hopes to begin its work in the summer of 1923.

Now to come to the First Voeu. The Committee appointed to consider it at the first meeting of the Assembly was favourable to it in principle. Their report proposed that the Assembly should pass the following Resolution :—

> "The Assembly of the League of Nations invites the Council to address to the most authoritative institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of States."

This is not quite the idea expressed in the Voeu, which perhaps took its colour from the fact that it was framed by a citizen of the United States, a nation which has not yet entered the League. Not unnaturally, however, the Committee of the Assembly

thought that a meeting of the Assembly itself would be the best form of conference, as no doubt it would be if all the nations in the world were comprehended in the League. But the principle that there should be meetings of the nations of the world for the purpose of legislation in the domain of international law, and that the legislators should receive the assistance which the various societies of experience could furnish to them, was supported by the Committee. The proposed legislation, it is true, was to be restricted to codification of international law and to its ascertainment, the latter probably through the medium of what we should call in England declaratory statutes.

Unfortunately, for some reason which to the writer is unintelligible, Lord Robert Cecil, one of the delegates, said that he considered that it was a very dangerous project at this stage of the world's history, and moved the previous question; and in spite of the interposition of M. Hymans, he carried it.

Perhaps one reason for the matter being so handled was that it came on for discussion at the end of the meeting of the Assembly. It is much to be hoped that the proposals will be renewed, and that on the next occasion there will be no dilatory resolution.

BLOCKADE IN MODERN CONDITIONS

By H. W. MALKIN, C.M.G.

PERHAPS the most interesting question, from the point of view of the international lawyer, which arose during the late war, is that of the legality of the methods adopted by the Central Powers on the one side and the Allies on the other to cut off the sea-borne commerce of their adversaries. As to the illegality of the methods adopted by Germany, there is nothing more to be said; *securus judicat orbis terrarum;* but as to the legality of the methods adopted by the Allies, so far as they did not fall within universally admitted rules as to contraband and blockade, there is more difference of opinion, and a brief consideration of certain aspects of the question may be of interest.

The action taken by the Allies, and particularly by Great Britain, on whom fell the main burden of dealing with Germany's sea-borne commerce, under the Order in Council of March 11, 1915, and subsequent similar instruments, was originally stated [1] to have been taken exclusively on grounds of retaliation, though at an early stage the word "blockade" was used [2] and came gradually to be employed as a comprehensive description of the whole system under which Germany's sea-borne commerce was progressively destroyed. It is not proposed to deal here with the sufficiency of the principle of retaliation as a justification in law for the measures employed; the subject has been fully discussed, and it may be doubted whether there are any fresh arguments to be found on one side or the other. But in their discussions with the Government of the United States which preceded the latter's entry into the war, the British Government went a considerable way in the direction of maintaining that their action could be justified as a legitimate extension of the rules of blockade, and this question is one which it is suggested calls for the fullest investigation, both by reason of its technical interest and also

[1] *e. g.*, by Mr. Asquith, when announcing in the House of Commons the measures which it had been decided to take.

[2] "The British Fleet has instituted a *blockade*."—Sir E. Grey to the American Ambassador, March 13, 1915.

because of the immense importance which it would seem must attach to it in future; for it is surely certain that if no blockade is legitimate which does not correspond to the rules derived from the old decisions of English Prize Courts and embodied in Chapter I. of the Declaration of London, blockade will, save in exceptional circumstances such as where one belligerent is an island state of comparatively small dimensions, be an entirely ineffective weapon in future wars.

At this point it may be convenient to deal with a suggestion which is made by some authorities, but which, it is submitted, is unsound. For instance, Mr. J. A. Hall says that—

"the distinction between absolute and conditional contraband has for practical purposes almost completely disappeared owing to the developments of modern war, *so that under the rules of contraband alone an almost complete commercial blockade can be maintained.* . . . Except for the fact that the doctrine of continuous voyage does not apply to blockade, and, therefore, such articles as are not on the contraband list can still be imported through neutral countries, *the enemy is as much hampered by the one belligerent right as by the other.*" [1]

This suggestion obviously ignores the power which blockade gives, but which can never be acquired under any doctrine of contraband, to cut off an enemy's exports, and the experience of the late war seems to show that the importance of this right, if it can be exercised, is very considerable. There is, indeed, a good deal to be said for the theory that if the list of contraband in force contains everything which is really useful for the enemy for the purpose of conducting the war, it is desirable to let him import as much non-contraband as he likes, thereby depressing his exchange in neutral countries and rendering it more difficult for him to pay for articles which are really necessary for his military requirements; but if this is so, it shows the importance of preventing the enemy from keeping up his export trade and thereby creating funds in neutral countries which are available for his military needs, for propaganda purposes, etc.; and owing to the fact that the origin of goods is usually much easier to ascertain than their destination, the stoppage of an enemy's exports through neutral ports can be effected much more quickly than his imports.[2] The loss, therefore, of the right to cut off

[1] *The Law of Naval Warfare*, by J. A. Hall, LL.M., Lt.-Commander R.N.V.R., 2nd ed. 1921, Chapman & Hall, p. 226.

[2] By September, 1915, six months after the Order in Council had come into force, 92 per cent. of the normal German exports to the U.S.A. had been stopped (see *Parl. Papers*, Misc., No. 2, 1916).

an enemy's exports would diminish the results of the command of the sea in a way for which no action taken under any extension of the right to seize contraband could compensate.

It is perhaps too early to expect to find in the text-books a full discussion of the question whether the measures taken by the Allies can be regarded as legitimate measures of blockade, as that operation is to be understood in view of modern conditions.[1] Mr. Hall's view is that—

"The measures of reprisal adopted by the Allies in March, 1915, and subsequently extended, achieved results tantamount to a blockade; but they were not a blockade as defined by international law. In the course of the correspondence which took place between the British Government and that of the United States upon these measures, the latter quite properly contended that a blockade cannot be extended to neutral ports, however important they may be as gates of supply to the enemy." [2]

He does not, however, discuss the point in detail, though he subsequently suggests that it would seem—

"to be a perfectly logical extension of the existing law to subject the cargo which was ultimately intended for, or had come from, blockaded territory, to confiscation, but to release the vessel if she herself was not guilty of blockade-running." [3]

It is not possible within the limits of the present article to discuss the subject in detail, but some suggestions may perhaps be made for the consideration of those who have more time to devote to the subject.

The measures taken under the Order in Council of March 11, 1915, and subsequent Orders, may be summarised as follows. Merchant vessels were not allowed to proceed on voyages to German ports, and unless the vessel was permitted to proceed to a neutral or allied port, the cargo was discharged to be ultimately restored to its owners. Merchants vessels which sailed from German ports were not allowed to proceed on their voyage with any goods on board laden at such ports; such goods were discharged and sold, the proceeds of sale to be dealt with as the Prize Court deemed just. Ships sailing to or from neutral ports

[1] The best discussion of the subject with which the writer is acquainted, and one to which his indebtedness will be obvious, is Mr. J. W. Garner's *International Law and the World War*, Vol. II. pp. 327–334. Reference may also be made to Sir F. Piggott's *The Neutral Merchant* (1915), pp. 71–89.

[2] *Op. cit.*, p. 195.

[3] *Op. cit.*, p. 227.

had to discharge any goods with enemy destination or origin, or which were enemy property. The treatment accorded to such goods originally varied in different cases, but was invariably less rigorous than condemnation. No penalty originally attached to the ship in respect of the carriage of such goods. By a later Order in Council of February 16, 1917, issued in consequence of the German announcement of unrestricted submarine warfare, vessels were made liable to capture and condemnation in respect of carriage of goods with an enemy destination or of enemy origin, but could escape condemnation on this ground by calling for examination at an appointed port. By the same Order goods of enemy origin or destination were made liable to condemnation. Thus the " sanctions " provided were in no case greater, and were for the most part less, than those universally admitted in the case of breach of blockade, and, consequently, if the action taken can be justified as a blockade no question of the legality of the penalties provided arises.

Of the three classes of goods dealt with under these provisions it must be admitted that the seizure of goods which were enemy property, but possessed neither enemy destination nor origin, is difficult at present to justify on the ground of blockade. In point of fact, however, it would appear that if any goods were seized on this ground alone the amount must have been very small. On July 24, 1915, Sir Edward Grey informed the American Ambassador that—

" In actual practice, however, we are not detaining goods on the sole ground that they are the property of an enemy. The purpose of the measures we are taking is to intercept commerce on its way from and to the enemy country. There are many cases in which proof that the goods were enemy property would afford strong evidence that they were of enemy origin or enemy destination, and it is only in such cases that we are detaining them. Where proof of enemy ownership would afford no evidence of such origin or destination we are not in practice detaining the goods." [1]

This pledge, if it is to be regarded as such, presumably lapsed on the entry of the United States into the war, but it does not appear that even after that date it became the practice to seize goods on the ground of enemy property alone. It is, therefore, possible to confine the discussion to the treatment of goods of enemy origin or destination, and the question really resolves itself

[1] Special Supplement to the *American Journal of International Law*, Vol. IX. July, 1915, p. 161.

into whether the doctrine of "ultimate destination"[1] can be applied to blockade.

The position in this respect appears somewhat singular. It is admitted that international law has moved far beyond the rules as they existed during the Napoleonic wars; it is admitted that it has moved even beyond the provisions of the Declaration of London. It is admitted that under modern conditions of commerce and communications the destination of goods, as shown in such papers as may be on board, is entirely inconclusive as to their real destination, and that consequently a belligerent is entitled as regards articles of contraband to seize them, irrespective of their ostensible destination, if he is in a position to prove that they are really intended for the enemy. It is admitted that a blockading force must, in modern conditions, be stationed at a considerable distance from the enemy's coast, from which it must result that ships bound for neutral ports will come under the observation of the blockading force and will consequently be liable to visit and search. But, although the changes of conditions which have necessitated these developments clearly apply irrespective of the character of the cargoes which are examined in such circumstances, it is stoutly denied in some quarters that the rules which are applicable if the goods are contraband with an enemy destination can apply to non-contraband goods with a similar destination, even though the belligerent has given notice of his intention, as under the principles of blockade he is entitled to do, to intercept all goods going to or from the enemy's territory. It is necessary, therefore, to examine the grounds on which the distinction between the two cases is apparently supported.

The first seems to be that, "a blockade cannot be extended to neutral ports," or, to quote Article 18 of the Declaration of London, "the blockading force must not bar access to neutral ports or coasts." This is, perhaps, the difficulty which is most felt by the international lawyer, but the answer to it surely is that the British blockade did nothing of that sort. The meaning of the rule embodied in Article 18 surely is that the line of blockade must not be so drawn that it absolutely prevents vessels bound

[1] This phrase seems preferable to "continuous voyage," which is a somewhat artificial conception. A supplementary doctrine of "actual origin" is necessary to cover goods exported from blockaded territory through a neutral port, but if the first can be established, the second follows logically.

for a neutral port from getting to their destination, because they cannot do so without passing the line and exposing themselves to condemnation for breach of blockade. In the days when a blockade was maintained by a line of ships, which no vessel was allowed to pass, stationed in the immediate vicinity of the blockaded coast, this was obviously a necessary rule; but it seems to be generally admitted, as it certainly was admitted by the Government of the United States during the period of their neutrality, that in modern conditions the blockading force can legitimately be stationed at a considerable distance, with the result that vessels bound for neutral ports necessarily meet the blockading squadron. The result is that if the contention now being dealt with is correct, the blockading force, if it meets a ship bound for a neutral port with a cargo consisting partly of goods intended for a neutral destination, partly of contraband goods with an enemy destination and partly of non-contraband goods with an enemy destination, is entitled to send in the ship in order that the contraband goods may be placed in the Prize Court (the goods with a neutral destination being allowed to proceed), without being accused of barring access to the neutral port, but if the non-contraband goods destined for the enemy were also removed the action of the blockading authorities would amount to barring access to a neutral port and would, therefore, be illegal. This may be good international law, but the ordinary person would regard it as far removed from common sense. The fact surely is that this particular criticism would only be applicable if the belligerent carried the doctrine of blockade so far as to prevent cargoes consigned to a neutral port and with a genuine neutral destination from proceeding. This was not done in the late war, since the enemy destination of intercepted goods had ultimately to be established in the Prize Court, but if it were done the rule would certainly apply; in the case under discussion its application seems to come perilously near a confusion of thought.

The second argument seems to be that there is no authority for such extension of blockade in the body of law laid down by the judges of Prize Courts, and especially by Lord Stowell. The fact that the Declaration of London ruled out any such extension (Art. 19) [1] is not really an additional consideration, as the rules

[1] It is a peculiar fact that Art. 19, if literally interpreted, would appear to eliminate the possibility of a vessel being condemned for breach of blockade outwards.

as to blockade contained in that instrument were admittedly only a reproduction of the old British rules as laid down by Lord Stowell. It must,of course, be admitted that there is no case in which Lord Stowell applied the doctrine of continuous voyage to blockade, and that there are cases, *e. g.* the *Ocean* [1] and the *Stert* [2] in which he declined to do so. These were cases of breach of blockade outwards, and it may be pointed out that each was a case of the blockade of only an individual port (Amsterdam) and not of a whole country, so that the goods in question might well have had an enemy origin and yet have originally come from a portion of the enemy country which was not blockaded. Further, it would appear from a passage in the *Stert* (at p. 67), "In laying down this rule as applicable to the present case, I proceed upon the supposition, that this was a real *inland navigation*, and not a navigation over the *Watt*, the character of which might be subject to a different signification," that Lord Stowell was prepared to consider the possibility of exceptions to his rule. But even admitting that the authority of Lord Stowell cannot be quoted in support of the doctrine, is this necessarily conclusive? The maxim that "if you see it in Christopher Robinson it is so" is no doubt conclusive to the English or American lawyer, though continental jurists have been known to cavil at it.[3] But the contrary proposition seems to involve a *non sequitur*, at any rate for those who are prepared to admit that international law must develop to meet changing circumstances. The question really is whether there is anything in the principles of blockade which is inconsistent with the doctrine under discussion; in other words whether, if Lord Stowell were sitting to-day, he would have felt himself bound to decide the point in the same way. It seems difficult for any one who is prepared to admit that the application of the doctrine of ultimate

[1] 3. C. Rob. 297.

[2] 4. C. Rob. 65.

[3] See *e. g.* Fauchille, *Traité de Droit International Public*, Vol. II. p. 942: "Les auteurs anglais ne cherchent pas à donner au blocus une base théorique. Ils se bornent à l'appuyer sur les décisions des tribunaux de prises d'Angleterre, selon leur tendance générale à considérer ces sentences comme l'expression du droit universel. 'La science, les grands intérêts de la civilisation chrétienne n'ont jamais eu pour les publicistes anglais qu'une importance très secondaire, en matière de droit maritime; leur grande affaire est de soutenir les prétentions de leur patrie sur ce terrain. Même les plus distingués d'entre les publicistes anglais, tels que Wilman, Oke Manning, James Reddie et Phillimore ne donnent pas d'autre base au droit de blocus que la pratique de la Grande-Bretagne.' (Gessner, *Le droit des neutres sur mer*, p. 165.)"

destination to contraband can be justified under the principles laid down by Lord Stowell, to deny the possibility of a similar measure in the case of blockade.[1]

The only blockade of first-class importance since the introduction of steam transport effected the change of conditions which are relied on as necessitating and justifying the principle of " ultimate destination " is that of the American Civil War, and here we are faced with a singular difference of opinion whether the American Prize Courts did, in fact, extend the principle to blockade or not. Mr. Hall [2] is definitely of the opinion that they did not, and an analysis of the cases will no doubt lend some support to this view. But it would be difficult to find a more clear and explicit statement than that of the Supreme Court in the *Springbok* :—

" But we do not now refer to the character of the cargo for the purpose of determining whether it was liable to condemnation as contraband, but for the purpose of ascertaining its real destination; for, we repeat, contraband or not, it could not be condemned if really destined for Nassau and not beyond; and, contraband or not, it must be condemned if destined to any rebel ports, for all rebel ports were under blockade." [3]

And certainly many eminent jurists have taken the opposite view. For instance, the late Mr. W. E. Hall states that " by the American Courts this idea of continuous voyage was seized upon and applied to cases of contraband *and blockade*." [4] The same view is taken by Fauchille,[5] who devotes a whole page in his chapter on blockade to a condemnation of the action of the American Courts. The same view was apparently taken by the Commission of the Institute of International Law, whose vigorous

[1] It is interesting to note that, according to Christopher Robinson, the first application of the principle of continuous voyage was in a case under the rules of the war of 1756, where Lord Stowell employed it to justify the release of goods in words which seem singularly applicable to a case of blockade (6. C.Rob. Note II.). " Another consideration was likewise pressed against these goods, that having been entered at *Bourdeaux*, and *exported* from thence it must be deemed an actual exportation from that port, and consequently that they are liable to be treated legally in the same manner (whatever that manner may be) as the goods first put on board at *Bourdeaux*. I incline to think that this would be much too rigorous an application of principles, rather belonging to the revenue law of this kingdom, a system of law having little in common with the general prize law of nations, and that these goods are entitled to be considered as coming from *Hamburgh, their original place of shipment*."

[2] *Op. cit.*, p. 209.

[3] 5 Wallace at p. 26.

[4] 7th ed., p. 720. The same passage occurs in the earlier editions.

[5] *Op. cit.*, p. 974.

condemnation in 1882 of the American decisions, even after they had been tacitly accepted by the British Government and upheld by the Mixed Commission of 1871, is a striking instance of the unwillingness of the international lawyer to admit the legality of anything for which a precise precedent cannot be found. The fact appears to be that the American Courts did not carefully distinguish in the cases with which they had to deal between contraband and blockade, and, as the articles which it was most profitable to import into the Southern States were naturally contraband, and consequently non-contraband articles would usually form only a small portion of the cargo and might in many cases be condemned under the doctrine of infection, the necessity for the distinction would seldom arise; but it would hardly seem open to doubt that if the Courts had had to deal with a cargo of non-contraband articles which were shown to be destined for a blockaded port *via* Nassau condemnation would have followed. The Matamoras cases, on which stress is naturally laid by those who deny that the American Courts did in fact apply the doctrine of continuous voyage to blockade, do not go beyond showing that the Courts were not prepared to condemn non-contraband goods consigned to a neutral port if the subsequent transportation was to be by land.[1] But, surely, this is the most illogical of all distinctions. It would appear rather that it is just in this case that the doctrine ought to apply if at all, for where the subsequent transportation is by land it is only during the voyage to the neutral port that the belligerent has the opportunity of intercepting the ship, while if the transportation is to be completed by sea he has, at any rate in theory, an opportunity of doing so while the ship is actually bound for a blockaded port.

Another criticism which was directed against the British measures was that they did not conform to the rule that a blockade must be impartially enforced against the commerce of all neutrals alike, on the ground that "German ports are notoriously open to traffic with the ports of Denmark, Norway and Sweden."[2] This contention was fully dealt with both in

[1] The authorities cited on this point in the *Peterhoff* were the *Stert* and the *Ocean*, and the Court stated in terms that "an ulterior destination to a blockaded port will infect the primary voyage to a neutral port with liability for intended violation of blockade" (5 Wallace, at p. 54).

[2] Mr. Page to Sir Edward Grey, Nov. 5, 1915, *State Papers*, Vol. 110, p. 651.

the British reply of April 24, 1916,[1] and in a letter by Mr. Balfour, in which he pointed out that the object of the rule was to prevent the blockading Power from using its privileges in order to mete out different treatment to different countries, and it seems now to be generally admitted that this particular criticism was not really applicable to the measures in question. It could hardly be successfully maintained that for a blockade to be effective it must prevent access to every portion of the enemy's coast; a blockade, for instance, of the eastern coast of the United States could hardly be held invalid because trade across the Pacific was free.

It may, perhaps, be suggested that the real objection which has been felt to the doctrine of ultimate destination is that to depart from the general principle that the destination of the ship is conclusive as to the destination of her cargo is to leave the realm of fact for that of opinion, and to permit the belligerent to act, not on ascertained facts, but on mere presumptions. This is certainly the idea underlying the passage in Fauchille referred to above. This objection, however, applies to the doctrine as much in relation to contraband as to blockade, and is obviously inconsistent with modern conditions. It will not really be a serious objection so long as the belligerent has to justify his action in a Prize Court which is independent of the executive and acts in accordance with the well-known principles laid down by Lord Stowell in the case of the Swedish Convoy.

In the light of the above considerations it is suggested that the distinction which is sought to be drawn in this respect between the rules applicable to contraband and to blockade is not really sound. If the right of a belligerent to seize contraband destined for his enemy is not allowed to be defeated by its being consigned to a neutral port, there is no logical reason why his right, in the case of blockade, to seize non-contraband goods with a similar destination must be defeated by the same device. It must be admitted that a blockade of this nature is in form very different from its ancestor. We have obviously travelled a long way from the original idea of the naval investment of a particular port, corresponding to a close siege by land, though the development of the idea, through the great advance made in the American Civil War, is easy to trace. The underlying principles are less easy to state, but it may perhaps be suggested that the extent

[1] *State Papers*, Vol. 110, pp. 672–3.

of a belligerent's right to interfere with sea-borne commerce is conditioned by the extent of his command of the sea, and that the real principle underlying the idea of blockade is the right of a belligerent to deny to the commerce of his enemy the use of areas of sea which he is in a position effectively to control. In other words, if a belligerent has a sufficient force at his command to enforce his being able to examine practically every ship which crosses a certain area of sea, he is entitled to say that his enemy's commerce shall not be carried on across that area. If his naval strength only permits him to intercept occasional ships, he has only the right to seize certain articles of such a nature that shippers and ship know that the carriage is at their own peril. It is, of course, necessary that notice should be given to neutrals of the acts on their part which the belligerent proposes to prevent; this is done in the case of contraband by the publication of lists of contraband articles, in the case of blockade by notification of the blockade.

It is a commonplace in theory, though not always admitted in practice, that international law must develop to meet changing circumstances if it is to be a real force. In the case of the laws of war at sea it is difficult for such development to take an orderly and regular course, for big naval wars occur only at considerable intervals of time, and it accordingly happens that when one of them breaks out international law may have at once to overtake the changes of conditions which have been brought about by the progress of science in half a century. Consequently, the nation which, in such circumstances, takes action which does not appear to be covered by the laws as they existed at the time of the last great naval war is certain to be accused of illegality by those whose minds are not receptive to the idea of the development of international law. But, unless the action taken is inconsistent with the underlying principles on which international law is based, the force of the attack will progressively diminish, and it will ultimately be found that the new developments have become accepted as a part of international law. No better instance of this can be found than the history of the decisions of the American Prize Courts in the Civil War. There is a considerable tendency (perhaps not unnatural, in view of the fact that international law is really based on the practice of nations) to hold that when a thing is done for the first time it must be illegal because it has not been done before, but if it is done again

to accept it on the ground that there is a precedent for it. This, however, is an unscientific method of procedure, and the true test surely is whether the new development is consistent with the main underlying principles of law and is necessitated by the changed circumstances in which it is applied. It is by this test that the allied blockade measures ought to be judged.

ANGARY

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I. *Etymology.*

ANGARY, the anglicised form of the Latin *angaria* and French *angarie*, derives from the designation of the royal courier service in ancient Persia,[1] a feature of which was probably the right to impress horses. The word was adopted from Persian into Greek, in which language it is found in various forms; for example, the verb ἀγγαρεύειν occurs in the sense of "despatch as a post-boat" in a fragment from an Egyptian papyrus dated 252 B.C.[2] From Greek it passed into Latin at least as early as the first century B.C., and in Lucilius *angarius* is found with the meaning of "a messenger." In the *Corpus Juris Civilis* and in medieval Latin *angariae* denoted requisitions of waggons, horses, etc., in connection with the *cursus publicus*. Only once in the *Corpus* is the word found in reference to the impressment of ships,[3] and in medieval Latin also it is rare in this sense.[4] It was apparently not until the seventeenth century that *angariae* began to be applied primarily to requisitions of shipping.

II. *Angariae in Roman Law.*

It is from the Roman usage of *angaria* in connection with the *cursus publicus* that the modern right in international law

[1] *Vide* Herodotus, Book VIII. (Urania), ch. 98.

[2] See J. P. Mahaffy on the *Flinders-Petrie Papyri*, Part II. Fragment XX., Dublin, 1893.

[3] "Naves eorum (sc. veteranorum) angariari posse . . . rescriptum est," *Digest*, Lib. XLIX. Tit. 18, 4, § 1.

[4] Harley ("The Law of Angary," in *American Journal of International Law*, Vol. 13 (1919), p. 268) is quite mistaken in his statement that "at least as early as the twelfth century the right (*i. e.* of angary) referred primarily to ships and lost its other meanings." Examination of the German laws of the fourteenth century shows *angaria* and *angariare* recurring with some frequency, but always in connection with the impressment of land transport, etc., not *ships*, and as late as the seventeenth century it was still frequently used in this sense (see the instances cited in § X. *infra*).

derives. The *cursus publicus* was first instituted by Augustus, and comprised a regular system of state posts. The cost of maintaining this system fell in the first instance upon the cities and districts traversed by the imperial roads. Horses and vehicles were normally provided at regular stages, but when these proved inadequate recourse was had to requisitions from private individuals, and these were known as *angariae*. A passage of special importance in the future history of the law of angary occurs in the fiftieth book of the *Digest*, where we read : " Hujusmodi igitur obsequia et hi, qui neque municipes neque incolae sunt agnoscere coguntur." [1] It is on this passage that the sixteenth- and seventeenth-century jurists based the right of a sovereign to requisition the ships of *foreigners* as well as those of his own subjects. It is noteworthy that the original law does not deal with the requisition of ships at all.

With the single exception cited in the preceding section *angaria* appears to be confined in the *Corpus Juris Civilis* to requisitions of land transport only, whereas in modern times angary has come to denote primarily the right to requisition ships. In Roman law requisitions of ships were known as *praestationes navium*. These *praestationes* were generally in connection with the transport of the *annona* from the provinces to Rome, and at a later date to Constantinople. There was a regular guild of ship-owners who normally undertook this duty, but when their ships were insufficient to meet the ordinary requirements of the service or on some special emergency, the ships of private owners were requisitioned,[2] " cum omnes," in the words of the law, " in commune, si necessitas exegerit, conveniat utilitatibus publicis oboedire." [3] It is to this practice that the modern right of angary is directly traceable.

The codes of Theodosius and Justinian contain numerous laws for the regulation of the *navicularia functio*, whether performed by the regular ships or by private vessels put in requisition. These laws assume a special importance for the student of international law, since as late as the early nineteenth century we find jurists such as Azuni applying them almost as they stand to the case of neutral vessels requisitioned under the law

[1] Tit. 4 (*De Muneribus et Honoribus*), 18, § 22.

[2] A ship so requisitioned was said *servire;* cf. the inscription " Navis . . . quae servit in Aemilianis," quoted by Loccenius, *De Jure Maritimo*, 1651, Lib. 1, Cap. V. Sect. 2 (p. 51), who compares the Swedish term *Tiena* used in a similar connection.

[3] *Codex*, Lib. XI., Tit. 4, 1, § 1.

of angary. Albrecht [1] states that in Roman law ships were not requisitioned except for the transport of the *annona*. This statement is, I think, erroneous, since impressment for purposes of military transport, *e. g.* the conveyance of arms, is clearly recognised in the *Titulus de Fabricensibus*,[2] where we read: "Quoties sane in translatione armorum angariae necessariae fuerint . . . naves vel angariae confestim praebeantur."

III. *The Middle Ages.*

The term *angaria* recurs with great frequency in medieval histories, collections of laws, etc., denoting requisitions of vehicles, horses, etc., for purposes of military transport. In the *Libri Feudorum* a clear distinction is still drawn between *angariarum* and *navium praestationes*.[3] Both these rights and a number of others are included among *regalia*, a point which has an important bearing on the future history of the law of angary. The system of *angariae* remained in much the same form as under the Roman Empire, and many abuses were still associated with it. We may compare the royal right of purveyance in England, which included the right to requisition transport.

Whilst the word *angaria* was not generally applied to requisitions of ships in the Middle Ages, the practice in regard to such requisitions is of considerable importance in relation to the subsequent development of angary in international law. English medieval records, for example, provide abundant evidence of the wide powers exercised by the Crown in the impressment of shipping. Requisitions were generally known as "arrests" of ships for the King's service. They were commonly made for the defence of the realm by sea, or the transport of troops upon military expeditions. In a recent essay in the *Law Quarterly Review* [4] Dr. Holdsworth has collected a large number of instances of these arrests, principally from the records contained in the Close and Patent Rolls. Dr. Holdsworth gives it as his opinion that the powers of the Crown to requisition were based on the theory of allegiance rather than territorial (or maritime) sovereignty, but this can hardly be the case when *foreign* ships

[1] "Requisitionen von neutralem Privateigentum, insbesondere von Schiffen." Supplement to the *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, 1912, p. 24.

[2] *Codex*, Lib. XI., Tit. 10, 7, § 1.

[3] Lib. II., *Feudorum*, Tit. 56.

[4] Vol. XXXV. (1919), pp. 12–42.

were put in requisition, and in such cases the Crown must surely have acted *ratione soli* rather than *ratione personae*. From the twelfth century onwards it was the regular practice of the Kings of England, when need arose, to requisition all shipping upon which the Admirals, acting under their orders, could lay their hands *irrespective of nationality*, and by a somewhat topsy-turvy process of reasoning one of the principal classes of evidence adduced by Selden and other champions of the claims of the English Kings to extensive sovereignty over the seas surrounding these islands was this established right to impress foreign shipping.[1] Selden's *Mare Clausum* contains a very informative passage on this subject.[2] He is emphatic that a reasonable hire was always paid.

Requisitions were not confined to cases of emergency. They were even made several months in advance of the time when the services of the requisitioned ship would be required.[3] Again vessels were often impressed for the conveyance of the King and Queen or members of the Royal Family, a practice which lasted until at least as late as the sixteenth century in Scotland.[4]

French practice was identical; Froissart, for example, tells us that foreign shipping was requisitioned in preparation for an invasion of England in 1386.[5] That such arrests were in fact frequent throughout Europe may be deduced from the provisions of the twelfth-century code of maritime law, the *Consolat del Mare*.[6]

IV. *The Sixteenth Century.*

With the discovery and development of printing in the latter half of the fifteenth century treatises on law began to multiply, and fuller information on contemporary legal theory becomes available. The laws governing the requisition of ships and land transport were still derived *en bloc* from the provisions of the *Codex*, now a thousand years old. Everything points to such

[1] See T. W. Fulton, *The Sovereignty of the Seas*, 1911, p. 32.

[2] Selden, *Mare Clausum seu de Dominio Maris Libri Duo*, 1636, Lib. II. cap. 20.

[3] Sir N. H. Nicolas, *A History of the Royal Navy*, Vol. I. p. 232.

[4] See, for example, *The Register of the Privy Council of Scotland* (Masson), Vol. IV. (1589), p. 469.

[5] See T. W. Fulton, *op. et loc. cit.*

[6] See, for example, ch. 237 in Pardessus, *Collection de Lois Maritimes*, 1831, Vol. II. p. 317.

requisitions having been as frequent as in the preceding centuries. Straccha, for example, in his *De Nautis, Navibus et Navigatione*,[1] writes : " et illud non est juris ambigui plaustrorum et navium praestationes inter regalia annumerari "; and Peckius [2] in his commentary on the maritime provisions of the *Digest* and the *Code* compares the right of the Crown " plaustra equosque privatorum pro devehendo ad exercitum commeatu retinere." In the *Decisiones Rotae Genuae* [3] is recorded an interesting case of the exercise of the right of angary which derives a special importance from the fact that it is adduced as a typical instance by eighteenth-century writers such as Emerigon [4] and De Steck.[5] This was the requisition by the Venetians of a Genoese ship carrying corn, which was compelled to change course and proceed to Corcyra and to unload and sell its cargo in that island, where there was a food shortage. The legality of this requisition *ob publicam utilitatem* (not, be it observed, *ob necessitatem*, a point of some importance in relation to later theories) is not called in question. The codes of maritime law current in the sixteenth century furnish further evidence on this point, the *Guidon de la Mer*, for example, speaking of the *arrêt* of a vessel " par privilège ou nécessité de quelque pays." [6] Similarly, the *Ordonnance* of Philip II of 1563 speaks of requisitions in foreign countries " moyennant un salaire ou autrement," [7] a phrase which suggests that the right of the owners of vessels put in requisition to payment for their services was not always recognised.

Contemporary English records contain numerous instances of arrests of shipping both in England and Europe generally, and prove that the right of angary was freely exercised upon all such vessels as chanced to be in the ports or territorial waters of the countries concerned, without regard to nationality. It may be noted in passing that none of the nice distinctions drawn by modern jurists between *embargo*, *arrêt de prince*, and *angary*

[1] See the compilation *De Mercatura Decisiones et Tractatus varii*, published in 1593, pp. 443–472.

[2] V. C. Petri Peckii, *In Tit. Dig. et Cod. ad rem nauticam pertinentes commentarii quibus accedunt notae Arnoldi Vinnii J.C.*, 1647.

[3] Contained in the compilation *De Mercatura*, etc., above cited.

[4] *Traité des Assurances*, Eng. trans. by S. Meredith, 1850.

[5] *Essais sur divers sujets relatifs à la navigation et au commerce pendant la guerre*, 1794.

[6] See E. Cleirac, *Les us et coutumes de la mer*, 1671, p. 247 (ch. ix. 13).

[7] Quoted from Pardessus, *op. cit.*, Vol. II. p. 503.

appear in this century, *arrest*, *stay*, and *embargo* [1] (most commonly the last) being applied indiscriminately, whether it is a question of a mere temporary prohibition against leaving a particular port or ports to keep important military or political intelligence from leaking out, of a simple requisition or of reprisals. A typical case of angary took place in 1539 [2] when a general arrest of shipping was ordered at Antwerp, with the object of preventing " vessels of all nations " from leaving the port " until a selection had been made of those wanted for the crusade against the Turk," as the Queen Regent informed the English representative, Wriothesley, on his entering a protest. The negotiations between Wriothesley and the Queen Regent are particularly interesting, since his protest was based primarily on the existence of a special treaty of intercourse which, as he claimed, gave the English an immunity from such requisitions which was not enjoyed by the nationals of other States. The justice of this protest was admitted and the English ships released in view of the treaty, although the embargo was not raised in respect of ships of other nations. Similarly, we learn that in 1536 " three or four English ships were arrested by Christian . . . more in accordance with the ancient privilege of his kingdom and necessity than to injure the English." [3] The owners were " to be well recompensed for their detention." Other typical cases of the exercise of the right of angary in this century were the requisition by the King of Denmark of French, Scotch and English ships found in his waters for the defence of his kingdom in 1510,[4] and the action of the Dutch in 1587 in requisitioning French and English ships and their cargoes at a time when there was a serious food shortage.[5]

[1] Just as *angary* can denote requisitions both of land and sea transport, so *embargo*, which is generally found in connection with ships, can also be applied to requisitions of vehicles and draught animals on land. Thus in the *Cabala* (p. 43) Sir William Alston writes to Secretary Conway as follows : " However, in respect of the King's departure (at which time they use to *embarge* all the mules and means of carriage in this town) I believe his lordship will not begin his journey so soon as he intended."

[2] *Letters and Papers—Foreign and Domestic, Henry VIII.*, ed. by J. Gairdner, 1539, Part I. pp. 166, 185, 195.

[3] *Ibid.*, 1536, Doc. No. 1019. (Christian is Christian III., King of Denmark and Norway.)

[4] J. Meursius, *Historiae Danicae sive de regibus Daniae*, 1638, Lib. II., *ad ann.* 1510, p. 51.

[5] Grotius, *Annales Belgici, ad. ann.* 1587.

V. *The Seventeenth Century.*

In the seventeenth century we get for the first time in the writings of contemporary jurists a more or less scientific inquiry into the legality of requisitions of foreign shipping, etc. Two main theories hold the field. One school, led by authorities such as Grotius[1] and Pufendorf,[2] consider it to be founded on the *jus necessitatis ;* and by *necessity* they mean a very real necessity such as in municipal law would justify an individual taking action which in normal circumstances would be illegal. In a time of desperate emergency Grotius held that the primitive community of things revived; and this would justify *inter alia* the requisition of foreign shipping. By quoting Seneca's maxim *Necessitas omnem legem frangit* Grotius makes it clear that such requisitions cannot in his view be explained on a strictly legal basis, the property of foreigners being, as he explains elsewhere, not subject to the *dominium eminens.* Ziegler,[3] Boecler,[4] Welwood,[5] De Cocceii,[6] and a number of others writers, however, specifically base angary on the right of eminent domain, holding that foreigners passing through a State became for the nonce its *subditi temporarii*, and by this complementary doctrine justifying the requisition of foreign property. At the same time they stipulate that such property should not be requisitioned except in case of necessity or at least where there is a clear public utility. There are, however, certain accretions to these theories, for example, the idea of the reciprocal liability of foreigners in return for benefits received (such as protection from pirates, and the use of harbours) which are held to justify the compulsory imposition of *vectigalia*,[7] among which *angariae* are counted; and the

[1] H. Grotius, *De Jure Belli ac Pacis Libri Tres*, ed. Becman, 1691, Lib. II. Cap. II. § 10; see also Lib. III. Cap. XVII. § 1.

[2] S. Pufendorf, *De Jure Naturae et Gentium*, trans. into French by J. Barbeyrac, 1734, Book II. ch. vi. § 8.

[3] C. Ziegler, *In Hugonis Grotii de Jure Belli ac Pacis Libros Notae et Animadversiones*, 1666, p. 23.

[4] J. H. Boecler, *In Hugonis Grotii Jus Belli ac Pacis Commentatio*, 1687, p. 117.

[5] G. Welwood, *De Dominio Maris assertio brevis ac methodica*, 1653, p. 39.

[6] *H. Grotius De Jure Belli ac Pacis . . . cum commentariis locupletissimis*, H. L. B. De Cocceii, 1756, Vol. II., ad Grot. Lib. II. Cap. II. § 14. De Cocceii, referring to requisitions of neutral ships uses language which would be equally appropriate to day : " Quamdiu ibi (*sc.* in foreign territorial waters) *commorantur* naves," he writes " tamdiu sunt in potestate et legibus illius territorii subjectae."

[7] See, for example, Welwood, *op. cit.*, p. 39, and Palazzi (Palatius) *De Dominio Maris*, 1663, p. 251.

same conception underlies the theory of a *jus transitus* cited by De Cocceii and others.

The second school which considered angary as a right inherent in sovereignty has most supporters, particularly amongst writers on maritime law and usage such as Loccenius,[1] Stypmannus [2] (who speaks specifically of a *jus angariarum*), Marquardus,[3] Strauch,[4] Molloy,[5] Welwood,[6] Schumacher,[7] Kramer [8] and Weger;[9] and indubitably this theory is in accord with the origins of *angariae* in Roman, and their subsequent incorporation into medieval law. It is, moreover, the theory on which contemporary monarchs such as Louis XIV based their practice. Throughout the century the right was freely exercised. " In dies observamus sisti naves . . . et in bellicas Principis necessitates trahi una cum naucleris et nautis," writes Perezius in his commentary on the *Codex*.[10] In a book published in 1609 Sir Thomas Overbury states that Henry IV of France was wont, when he required vessels, to lay an *embarque* on the shipping in French ports;[11] and Sir John Boroughs in the first half of this century writes of the English practice as follows :—

" Now for the King of England's sovereignty in opening and stopping the passage of his seas, the Presidents of antient times *imbarging* and staying not only Pirates or Enemies but Friends also . . . *upon some . . . urgent occasion or reason of State* are so frequent in Record of Story that the transcribing and reading of a thing so generally known would certainly be esteemed loss of time and labour." [12]

A typical example was the " embarguing " by the Persians of a

[1] J. Loccenius, *op. cit.*, Lib. I. Cap. V.

[2] F. Stypmannus, *Jus Maritimum*, Pars. V. Cap. I. § 23, p. 608 in J. G. Heineccius, *Scriptorum de Jure nautico et maritimo fasciculus*, 1740.

[3] J. Marquardus, *De Jure Mercatorum*, 1662, Lib. II. Cap. V. 38, p. 226.

[4] J. Strauch, *De Imperio Maris*, 1674, Cap. VI. § 2–6.

[5] C. Molloy, *De Jure Maritimo et Navali*, 1682, ch. vi.

[6] *op. et loc. cit.*

[7] G. Schumacher, *De Jure Pontium*, in the *Dissertationes Stryckianae*, Vol. II., Disput. 5, 3.

[8] B. G. Kramer, *De Jure Navium*, ibidem, Vol. VIII., Disput. *cit.* Cap. III. § 59 ff.

[9] A. Weger, *De Jure Portuum*, ibidem, Vol. X., Disput. *cit.*, § 25 ff.

[10] Perezius, *Praelectiones in duodecim libros Codicis Justiniani Imp.*, 1653, p. 757 ad Lib. XI., Tit. I.

[11] Sir Thomas Overbury, *Observations on the State of France, 1609, under Henry the Fourth*, in *Works* (ed. Rimbault, 1890), p. 243.

[12] *The Sovereignty of the British Seas by Sir John Boroughs*, in De Malynes's *A Collection of Sea Laws, etc.*, 1686.

number of English vessels which were used for the capture of Ormuz from Portugal in 1622.[1]

The legality of these and similar requisitions does not seem to have been called in question, but a sovereign using foreign vessels for his own purposes was generally considered bound to pay a reasonable hire. Opinion was, however, divided as to the liability of the requisitioning authority to indemnify the owners in the event of the loss of the vessels affected. Some writers, such as Loccenius, altogether deny liability; others such as Marquardus, Gentilis and Zouche[2] declare that an indemnity is due; yet others (Kuricke[3] quotes this view) draw a distinction based on the nature of the service, holding that no indemnity need be paid if the requisition is made for purposes of war, but that if it is for such purposes as an expedition to acquire fresh territory, it is only fair that adequate compensation should be paid. It may be noted that the services of crews were in most cases[4] compulsorily requisitioned along with the vessels.

A considerable number of treaties were concluded in this century between the different European Powers relative to the requisition of foreign (or in time of war *neutral*) shipping. Most of them absolutely prohibit such requisitions,[5] but Harley is mistaken in his statement that "all the seventeenth-century treaties specifically denied the right."[6] For example, the treaty concluded in 1654 between Cromwell, as Protector of England, and the United Provinces of the Low Countries stipulates (Art. XIX.):—

"That the merchants, masters, and seamen of neither party, their *ships*, goods, wares or merchandise shall not be arrested or seized in the Lands, Havens, Roads, or Rivers of the other to serve at war or any other use by vertue of any

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[1] *Epistolae Hoelianae*, Book I., Sect. 3, letter 11. Howell speaking of this incident says that "it was no voluntary but a constrained act in the English, who, being in the Persians' port, were suddenly *embargu'd* for the service."

[2] A. Gentilis, *Hispanicae Advocationis Libri Duo*, 1651, Lib. I. 26, and R. Zouche (or Zouch), *Juris et Judicii fecialis sive Juris inter Gentes et Quaestionum de eodem Explicatio*, 1650, Pars. II. Sect. V, Quaest. 10. These two authorities deal with the same case, the requisition of an English vessel by the Duke of Tuscany.

[3] R. Kuricke, *Resolutio quaestionum illustrium ad jus maritimum pertinentium*, in J. G. Heineccius *op. cit.*

[4] But not always, see Marquardus *op. et loc. cit.*

[5] *e. g.* The treaty of 1642 between England and Portugal (Art. X.), the treaty between Denmark and the States-General of 1645, and the treaty between Great Britain and Spain of 1667 (in which the term *embark* is employed).

[6] *op. cit.*, p. 279.

general or special command, unless upon an extraordinary necessity and that just satisfaction be given for the same.[1]

This stipulation was renewed in the treaty of 1667 between Charles II and the States-General.

VI. *The Eighteenth Century.*

The majority of eighteenth-century jurists regarded angary as a legitimate exercise of sovereign power. The Grotian theory that the only justification for laying hands on foreign property is to be found in necessity, which in the last resort overrides all law and temporarily revives the primitive community of things, still, however, has its exponents, such as Hertius.[2] Other writers recognise that the right of angary is well established in international usage, but express themselves rather dubiously as to its legality; for example, Heineccius speaks of *angariationes* as of frequent occurrence and states that they are *excused* on the ground that even foreign vessels which are found within a State's territorial waters are after a fashion (*quodammodo*) subject to its jurisdiction.[3] Heineccius is perhaps the earliest writer who uses *angariatio* in the sense in which angary is commonly used to-day, *i. e.* to denote requisitions of *neutral* shipping; for he speaks of the seizure of *bona extraneorum non hostium* [4] and defines angary as the detaining of friendly vessels found in a State's harbours and their employment for the transport of troops or conveyance of stores. A very few jurists, such as Hübner,[5] condemn the practice altogether.

De Réal [6] is a typical supporter of the right. "Le simple besoin," he writes, "autorise un souverain à mettre un embargo . . . sur tous les navires marchands qui se trouvent dans ses ports." "La seule raison de bienséance" is enough to justify the requisition of foreign merchant ships; ships of war are, however, immune from seizure. Emerigon [7] similarly, in his

[1] The English version is quoted from *A General Treatise of the Dominion of the Sea*, 1710, p. 542.

[2] J. N. Hertius, *Commentationes atque Opuscula*, 1737, Vol. I. p. 102.

[3] J. G. Heineccius, *Opera Omnia*, 1744, Vol. I., *Elementa Juris Naturae*, ch. viii.

[4] Albrecht, *op. cit.*, pp. 30 and 35, is therefore scarcely accurate in stating that it was not until the nineteenth century that angary began to be specially applied to requisitions of neutral shipping, and his remark that Vattel "ein jus Angariae dem Namen nach nicht kennt," though true enough, loses much of its point.

[5] *De la saisie des bâtimens neutres*, 1759.

[6] M. de Réal, *La Science du Gouvernement*, 1764, Vol. V. ch. ii. ix. pp. 536–540.

[7] *op. cit.*, ch. iii. sect. xxx. ff.

Treatise on Insurances, maintains that angary is a legal exercise of sovereign power; he uses the term *arrêt de prince*, defining *embargo* as the complete closure of the port or ports concerned.

Amongst other eighteenth-century jurists of note who treated of angary (generally under the designation *embargo*) De Steck,[1] Vattel [2] and De Martens [3] merit a brief citation. De Steck, whilst regarding angary as a right of sovereignty, is of opinion that foreign vessels may only be requisitioned in case of necessity, and payment must be made for services rendered, though compensation is not generally paid in respect of any period of detention before the voyage is undertaken. Vattel considers that angary rests on necessity, "which revives the primitive communion of things." De Martens is doubtful as to the legality of requisitioning foreign shipping on a basis of *la loi naturelle*. "L'usage," he says, "avait introduit cette sorte d'embargo, mais aujourd'hui la plupart des traités l'ont aboli." If it is permissible to requisition foreign vessels at all, it must be *moyenant une retribution proportionée*.

In the first half of the eighteenth century cases of the exercise of the right of angary were tolerably frequent. For example, in 1714 the Spanish requisitioned four English ships at Barcelona for an expedition against Majorca.[4] In 1718 the Spanish again requisitioned neutral shipping on a large scale for an expedition to Sicily; similar requisitions were made in 1732, 1735, 1739, 1740 and 1748. In 1746 the French requisitioned a large number of neutral vessels for the transport of troops to Scotland in support of the Pretender. Sweden, Denmark and Holland entered diplomatic protests on this occasion, but were answered by the French Minister of Marine "que le Roi en mettant ces embargos n'avait fait que se servir du droit qu'ont tous les souverains dans les ports de leur dépendance." [5] The liability of foreign ships to such requisitions when in foreign ports or territorial waters was, in fact, universally recognised, and a large number of treaties were concluded, more particularly after 1750, stipulating for the immunity of vessels belonging to the contracting parties.

[1] *op. cit.*

[2] E. Vattel, *The Law of Nations* (Eng. trans., 1811), Book II. ch. ix. § 121.

[3] J. F. de Martens, *Précis du droit des gens moderne de l'Europe*, 1864, § 313.

[4] See a despatch from Admiral Sir J. Wishart to Burchett in *Documents relating to the Law and Custom of the Sea*, Vol. I. p. 237 (ed. R. G. Marsden, Navy Records Society).

[5] De Réal, *op. et loc. cit.*

There was a " stock " clause for this purpose which the Abbé de Mably gives as follows :—

" On ne peut arrêter les marchands, les maîtres de navire, les pilotes, les matelots, ni saisir leurs vaisseaux et leurs marchandise en vertu de quelque cause que ce soit, de guerre ou autrement, ni même sous prétexte de s'en servir pour la défense du pays." [1]

Examples of treaties containing this or similar stipulations are the treaty of 1725 between Austria and Spain, and the treaty of 1782 between Russia and Denmark, the treaty of 1785 between the United States and Prussia, and the treaty of 1787 between France and Russia.

As a consequence of these and similar treaties the right began to fall into disuse towards the close of the century,[2] but it was revived by Napoleon's action in 1798, when a large number of neutral vessels were requisitioned for the transport of the French expedition to Egypt. As this incident has been examined at length by a recent writer on the law of angary,[3] it is unnecessary to give further details, but it should be noted that the authors of the treaty between the United States and Prussia of 1799, with this precedent fresh in their minds, inserted a stipulation providing for the requisition of the ships of one party by the other in any public emergency, subject to payment of an indemnity which should include compensation for any loss occasioned by the delay, in addition to the payment of a fair freight. This stipulation marks a definite stage in the history of the right of angary, since the general practice of the century, with very few exceptions, had hitherto been to pay freight only and deny liability for any further compensation.

The fact that this treaty specifically states that vessels of the contracting parties shall have " no right to claim the exemption in their favour stipulated in the 16th article of the former treaty of 1785 " is further evidence that the governments of the day fully admitted the liability of merchant vessels belonging to their nationals to requisition by foreign Powers in the absence of express treaty stipulations to the contrary.

[1] Abbé de Mably, *Le droit public de l'Europe fondé sur les traités*, 1741, Vol. II. p. 329.

[2] De Steck, writing in 1794, quotes only one instance later than 1748.

[3] Harley, *op. cit.*

VII. *The Nineteenth Century.*

The authorities who treated of the law of angary during the early years of the nineteenth century were no doubt influenced both by Napoleon's action in 1798 and by the treaty between the United States and Prussia of 1799. Boucher,[1] Tetens and Azuni, for example, all admit the right subject to payment of an indemnity. Tetens,[2] like most jurists of the preceding century, still uses the term *embargo ;* he regards it as a belligerent right only, not to be exercised except in case of *extrême nécessité.* Azuni,[3] on the contrary, admits its exercise both in time of peace and war. It is not, in his view, a belligerent right but a *droit régalien* and *du nombre des prérogatives de la puissance suprême.* Accordingly, vessels can be requisitioned not only in cases of necessity but also for purposes of public utility. Such requisitions must, of course, be *moyennant salaire.* Klüber,[4] indeed, is almost the only authority who, writing in the first quarter of the nineteenth century, denies the legality of angary.

Of later nineteenth-century writers the large majority recognise that requisitions of foreign shipping are legal in case of necessity, subject to payment of compensation; for example, De Cussy, Ortolan, Heffter, Geffcken, Funck-Brentano and Sorel, Manning, Halleck, Ferguson, Testa, De Martens, Den Beer Portugael, Rivier and Calvo[5] are all of this opinion. Other authorities admit that such requisitions have the authority of usage but express themselves rather dubiously as to their legality. Thus Massé styles angary as "moins l'exercice d'un droit que l'abus du pouvoir," and Gessner thinks that the practice can only be justified by "la nécessité de la conservation personelle." Rolin-Jaequemyns,[6] and Woolsey are also of this school of thought. A very few authorities, of whom Hautefeuille is the chief, will not admit that angary is permissible in any circum-

[1] P. B. Boucher, *Institution au droit maritime*, 1803, pp. 253 and 396 (§§ 921 and 1540).

[2] J. N. Tetens, *Considérations sur les droits réciproques des puissances belligérentes et des puissances neutres sur mer*, 1805, p. 22.

[3] Azuni, *Droit Maritime de l'Europe*, 1805, Vol. I. pp. 293 ff.

[4] Klüber, *Droit des gens moderne de l'Europe*, 1819, Vol. I. p. 439, § 286.

[5] I do not give detailed references to the works of these and other modern authorities cited below since they are well known and in everyday use.

[6] *Revue de Droit International et de Législation Comparée*, Vol. III. p. 571 (1871).

stances whatsoever. It must, however, be borne in mind in examining the views of these authorities that there is some difference of opinion as to what the term *angary* connotes. Some authorities confine it to requisitions of foreign shipping, but others hold that it is applicable to requisitions of all kinds of neutral property, though primarily to means of transport. Otherwise the most noticeable feature is the growing tendency, particularly in the latter half of the century, to regard it as a purely belligerent right, legitimised by considerations of military necessity. On the other hand, a minority of writers such as Azuni, de Cussy and Ferguson continue to consider it as a legitimate exercise of sovereign power irrespective of a state of war; Ferguson in particular specifically bases angary on the right of eminent domain.

Cases of the actual exercise of the right were few and far between in this century. In 1801 the French General Salignac compelled the captain of a Russian ship in harbour at Ancona to carry artillery to Tarentum, although she was already chartered in the normal course for another voyage.[1] The examples most generally quoted in modern writers are, however, the *Duclair* incident of 1870 when seven English colliers were sunk in the Seine by the Germans to prevent the passage of French gunboats, and the requisition by the Germans, also during the course of the Franco-Prussian War, of a quantity of Swiss and Austrian rolling-stock. The German Government cited the *jus angariae* in justification of their action in the former case,[2] and Bismarck denied that the owners of the vessels had any right to compensation, though expressing willingness to pay as an act of grace. As the British Government in their reply offered no comment on this citation of the right of angary, they must be taken to have admitted its existence in international law. After the Duclair incident the term *angary* is generally extended to cover the *destruction* of neutral vessels as well as their requisition for such uses as the transport of troops.

A great number of treaties were concluded in the nineteenth century relative to the right to requisition foreign shipping in time of emergency. The large majority explicitly recognise the legality of such requisitions, whether in time of peace or war, in case of public necessity, provided an adequate indemnity is

[1] Boucher, *op. et loc. cit.*

[2] See, however, § X. below.

paid.[1] It is generally stipulated that the indemnity shall be agreed, if not actually paid, in advance. A very few treaties, however, altogether prohibit angary in any circumstances; examples are the Danish-Prussian Treaty of 1818, the treaty between the United States and Turkey of 1830, the treaty between Denmark and Venezuela of 1838, and the treaty between Italy and San Domingo of 1886.[2]

At the very end of the century the Institute of International Law at the Hague Session of 1898 announced that the right of angary "is suppressed." The Réglement approved by the Institute in this connection was, however, presumably intended to be not so much a statement of existing law as a *voeu* respecting the lines on which future legislation should develop.[3]

VIII. *The Twentieth Century to the Outbreak of War in* 1914.

There is little change in these years from the views expressed by writers on international law during the closing decades of the preceding century. Two jurists of high repute, however, Kleen and Lawrence, appear as uncompromising opponents of the right of angary. Kleen, like Hautefeuille, weakens his case by exaggeration and by showing scant regard for historical accuracy, *e. g.* in his statement: "Toutefois l'usage n'est plus consacré dans les traités conclus postérieurement à l'époque de Louis XIV."[4] A few writers such as De Louter and Mérignhac oppose the theory of the right, but admit that angary in one form or another is an established usage, whilst one special application,

[1] *e.g.* The treaties between Sweden and Russia of 1801, U.S.A. and Guatemala of 1825, Mexico and Prussia of 1831, Great Britain and Bolivia of 1840, Denmark and Greece of 1846, Germany and Spain of 1868, Italy and Guatemala of 1868, Italy and Mexico of 1870, Germany and Portugal of 1872, France and Mexico of 1886, Germany and Nicaragua of 1896. The footnote in Hall, *International Law* (7th ed.), p. 813, is erroneous, as will be seen, in stating that *all* the treaties in which "the neutral owner is to some extent protected from loss by a stipulation that he shall be compensated" are made with Central or South American States. The above list contains two such treaties between European Powers.

[2] Harley cites the first and the last of these treaties only and remarks erroneously that with these exceptions "all the nineteenth . . . century treaties allow the exercise of the right of angary with full indemnity." The footnote (1) on p. 813 of Hall's *International Law* is incorrect in stating that "stipulations forbidding the seizure of ships or merchandise . . . for public purposes . . . do not appear after the early years of the last century." Cf. also the Italian–Nicaraguan Treaty of June 25, 1906.

[3] *Annuaire de l'Institut de Droit International*, Vol. XVII. (1898), pp. 57, 255, 284.

[4] R. Kleen, *Lois et Usages de la Neutralité*, 1900, Vol. II. pp. 68–74.

viz. the requisition by a belligerent of neutral railway material has, they concede, become an institute of positive international law, in Article 19 of the Fifth Hague Convention, 1907.

On the other hand, the large majority of authorities recognise angary as a belligerent right at least, for example Perels (who is one of the very few modern jurists who consider that it is legal to requisition the services of the crew as well as the vessel), Nys, Hall, Despagnet, Bonfils, Oppenheim, Albrecht, Pearce Higgins, Westlake, Borchard and Wehberg. Westlake (writing in 1913, only a year before the outbreak of the late war), expressed the view that the impressment of neutral ships was not likely to be of much use under the conditions of modern naval warfare! A few writers continue to regard the right as theoretically exercisable in time of peace as well as war, for example Bonfils, Oppenheim (who, however, thinks the right in this form is "probably obsolete") and Albrecht. The last-mentioned, after a very careful and detailed investigation of the authorities, pronounces emphatically in favour of the right, the legal basis of which he finds in a mixture of the elements of sovereignty and necessity. Article 6 of the United States Naval War Code of 1900 specifically authorises the seizure of or destruction of neutral vessels "within the limit of belligerent authority, if military necessity should require." In 1906 the Institute of International Law refused to accept a draft article of a *Régime de la neutralité* prohibiting angary, the discussion revealing a marked cleavage of opinion on the subject between the authorities present.[1]

There is little change in treaty practice from the preceding century: a single treaty, that concluded between Italy and Nicaragua in 1906, prohibits the exercise of the right absolutely, but the general tendency is to recognise angary as legitimate, subject to payment of compensation in advance, as in the German-Portuguese treaty of 1908.

An incident which has been described as a case of angary occurred in 1901 when a British merchantman, the *In Time*, was sunk in Venezuelan waters in the course of operations of war;[2] but this incident is of little importance in comparison with the requisitions of shipping made both by belligerents and neutrals in exercise of the right of angary in the course of the late war.

[1] *Annuaire de l'Institut de Droit International*, Vol. XXI. p. 406.

[2] See T. Baty's *International Law*, 1909, p. 239.

IX. *The War of* 1914–1918 *and After.*

A number of very interesting cases of the exercise of the right of angary occurred between 1914 and 1918. The requisition by the British Government in 1914 of four warships in process of construction in British shipyards for Chile and Turkey (then neutral) has been cited by some authorities as a case of angary.[1] This would appear to conflict with the views taken by eighteenth-century jurists such as De Réal and De Steck that warships or vessels in the public service of a foreign Power cannot in any circumstances be made the subject of requisition. However, it must be borne in mind that these vessels had not been taken over by their future owners, so that they were in a quite different position from Turkish or Chilean battleships *in commission* temporarily within British waters; in fact, they must be regarded as so much war material rather than as individual ships.

In April, 1915, the British Crown requisitioned 400 tons of copper forming part of the cargo carried by a Swedish vessel, the *Zamora*, which had been seized off the Shetland Isles and was at the time of this requisition in the custody of the Prize Court. The doctrine of angary was raised in connection with this case, which was heard in the first instance before Sir Samuel Evans in the Probate, Divorce and Admiralty Division. Counsel for the Swedish owners argued that the " disputed right of angary " no longer existed. Sir Samuel Evans after citing numerous precedents allowed the requisition, holding that it was " within the power and prerogative of the Crown to make an Order giving the right to requisition neutral property which may be of use to the Crown as a belligerent, subject to making compensation therefor." [2] On appeal, however, the Judicial Committee of the Privy Council reversed this decision. Lord Parker, in giving judgment, spoke of " the right of a belligerent to requisition the goods of neutrals found within its (*sic*) territory or territory of which it is in military occupation " as " sometimes referred to as the right of angary," and stated that " it is generally recognised as involving an obligation to make full compensation." After citing the *Duclair* incident and the requisition by the Germans of Austrian rolling-stock during the Franco-Prussian War, he proceeded to say that it must be held that in 1870

[1] *e.g.* Coleman-Phillipson, *International Law and the Great War*, 1915, p. 72.

[2] See *Times Law Reports*, Vol. XXXI. No. 28, pp. 513 ff.

Germany had expressed and England and Austria had acquiesced in the view that to justify the exercise of the right of angary " a very high degree of convenience to the belligerent Power would be sufficient." This, he added, was also the view taken by the only British Prize decision dealing with the point.[1] Finally he summed up the present position in international law in regard to requisitions of neutral ships, etc., in the custody of the Prize Court as follows :—

> " A belligerent Power has by international law the right to requisition vessels or goods in the custody of its Prize Court pending a decision of the question whether they should be condemned or released, but such right is subject to certain limitations. First, the vessel or goods in question *must be urgently required for use in connection with the defence of the realm, the prosecution of the war or other matter involving national security.* Secondly, there must be a real question to be tried, so that it would be improper to order an immediate release. And, thirdly, the right must be enforced by application to the Prize Court, which must determine judicially whether, under the particular circumstances of the case, the right is exercisable."

As in the case under consideration all the prescribed conditions were not fulfilled the appeal was allowed.[2]

In November, 1915, Italy, although not at war with Germany, requisitioned a number of German vessels in her ports. The actual decreee issued by the Italian Government in this connection was framed in general terms applicable to all foreign merchantmen, pleasure yachts, etc., in Italian territorial waters. Provision was made for the payment of compensation monthly, but the scale of compensation was to be determined by a purely Italian commission. Thirty-four German vessels were requisitioned in all, and the German Government did not enter any protest.[3]

On February 23rd, 1916, the Portuguese Government requisitioned seventy-two German ships in Portuguese territorial waters. This requisition was complicated by the fact that the German-Portuguese treaty of 1908 admitted the requisition of ships, but only subject to the payment *in advance* of compensation to be agreed between the interested parties on a just and equitable basis. The Portuguese Government did not comply with these stipulations, inasmuch as no attempt was made to settle the

[1] *The Curlew, The Magnet*, Stewart's *Vice-Admiralty Cases* (Nova Scotia), p. 312.

[2] See *Times Law Reports*, Vol. XXXII. No. 22, pp. 436 ff.

[3] See the *Revue Générale de Droit International Public*, Vol. XXIV. p. 166, and J. W. Garner, *International Law and the World War*, 1920, Vol. I. pp. 175 ff.

compensation payable in advance, and its amount was determined by the unilateral decision of a purely Portuguese commission. Germany accordingly entered a diplomatic protest against this breach of treaty stipulations. The Portuguese Government in reply sought to justify their action by citing the right of eminent domain which they possessed over all properties within Portuguese territorial jurisdiction, irrespective of nationality, and by endeavouring to show that the 1908 treaty applied only to vessels *in transitu*, whereas the German vessels in question had been immobilised in Portuguese harbours for over eighteen months. This line of argument is ingenious, but, *pace* Basdevant,[1] seems hardly tenable. The Portuguese Government undoubtedly committed a breach of treaty stipulations, and they could hardly plead, even if they had wished to do so, that *extrême et dernière nécessité* which De Steck, writing in the eighteenth century, says would justify a State in ignoring a conventional engagement of this character.

In May, 1917, the Brazilian Government requisitioned forty-two German vessels in Brazilian waters;[2] in the same month the British Government requisitioned a number of merchant-vessels plying under the Dutch flag which were stated to be "really British owned or chiefly British owned."[3]

In March, 1918, the Governments of Great Britain and the United States requisitioned approximately 1,000,000 tons of Dutch shipping "in exercise of the right of angary."[4] This step gave rise to a prolonged and interesting diplomatic correspondence between Great Britain and Holland. The Dutch made an emphatic protest, asserting that—

"the so-called right of angary is the right of a belligerent to appropriate as an exception a neutral ship for a strategical end of immediate necessity, as, for example, to close the entrance of a seaport, so as to hinder the attack of an enemy fleet. Application of this right to a fleet *en masse* is an interpretation entirely arbitrary and incidental (*d'occasion*)."

This is the view of angary which we have seen gradually coming into vogue in the latter half of the nineteenth century,

[1] See the *Revue Générale de Droit International Public*, Vol. XXIII. (1916), pp. 268 ff.

[2] See Garner, *op. et loc. cit.*

[3] See the despatch addressed by Sir W. Townley to M. Loudon on May 22, 1917, *Parl. Papers*, Misc. No. 5 (1918).

[4] See the telegraphic despatch from Mr. Balfour to Sir W. Townley dated March 21, 1918, *Parl. Papers*, Misc. No. 11 (1918).

viz. that it is a purely belligerent right. Even so the Dutch definition is unduly restrictive and seems based on the *Duclair* incident. In point of fact it was precisely to the seizure of neutral shipping *en masse* that in the seventeenth and eighteenth centuries the term angary was generally applied. The British Government in replying quoted a long list of authorities ancient and modern in support of the view that angary " is a legal exercise of the right of a sovereign State and not an act of a belligerent based on no principle of law and for which the only justification is to be found in usage." [1] The United States Government did not commit itself in the first instance to any extensive juristic argument as to the legal basis on which their action rested, but merely referred in the President's proclamation of March 20, 1918, to the " law and practice of nations " which " accords to a belligerent Power the right in times of military exigency and for purposes essential to the prosecution of war to take over and utilise neutral vessels lying within its jurisdiction." This would seem to indicate reliance on the theory of military necessity, but a passing reference in the explanatory statement published at the date of the proclamation to " the exercise of our indisputable rights as a sovereign " suggests that the United States were disposed to take the same view as that expounded by the British Government.[2]

In August, 1918, the Spanish Government requisitioned all German vessels lying in Spanish ports to the number of about ninety.[3]

A considerable number of contemporary authorities have discussed these incidents, and particularly the exercise of the right of angary by neutrals such as Portugal. It is interesting

[1] See *Parl. Papers*, Misc. No. 11 (1918). [Cmd. 9025.]

[2] Commenting on the terms of the Proclamation and statement J. B. Scott remarks that " necessity is not invoked to create the law; it is only stated in order to justify the exercise of the right in accordance with the letter and spirit of the law." See *American Journal of International Law*, Vol. XII. (1918), pp. 340 ff. At a later stage in reply to a Dutch protest the United States Government stated that they would not argue the case as the right of the competent U.S. authorities to requisition neutral shipping voluntarily within its jurisdiction, " is so well known as to render citation of precedent and authority unnecessary."

[3] See Harley, *op. cit.*, p. 299. The Spanish Government's reference in making this requisition, to the sinking by German submarines of more than 20 per cent. of the Spanish mercantile marine, involving the death of one hundred Spanish seamen, suggests a case of reprisals rather than angary. The requisition is also spoken of as " a temporary solution until the establishment of peace, when Spanish claims also will be liquidated."

in this connection to note that Alvarez writing in 1915, before any case of this class had arisen, argued on purely theoretical grounds that a neutral State was undoubtedly just as much entitled as a belligerent to requisition foreign shipping in its ports.[1] With one or two exceptions there is a clear consensus of opinion that the Portuguese Government's action was (apart from treaty stipulations) just as legal as that of the British and United States Governments at a later date. This is the view taken by Basdevant,[2] Clunet,[3] who states that angary is " un des attributs de la souveraineté territoriale," Harley and Fauchille.[4] Pchédécki,[5] on the other hand, is of opinion that angary is a purely belligerent right which cannot be exercised by neutrals. Von Liszt shares this opinion and accordingly regards Portugal's action as a breach of international law, whilst admitting the legality of the requisitions made by Great Britain and the United States.[6] Rolin,[7] too, writes of angary as a purely belligerent right, and curiously enough makes no mention whatever of its exercise by neutral Powers such as Italy and Portugal. All these writers, it may be added, take the view that the requisition of vessels cannot, as in former days, be extended to their crews. " La réquisition," in Fauchille's phrase, " doit porter sur des navires instruments matériels, non sur des entités organisées." This limitation of the old right was also admitted by the British Government in the course of the diplomatic correspondence with Holland above mentioned.

X. *Conclusions.*

The incidents described in the preceding section, and the considered views expressed upon them by Great Britain, the United States and lesser Powers show beyond question that *a* right of angary still exists; and, as has been shown, it has found general support in the writings of present-day jurists such as Basdevant, Clunet, Harley, Rolin, Fauchille and Von Liszt. But what is the nature of this right?

[1] Alvarez, *La Grand Guerre Européene et la Neutralité du Chili*, 1915, p. 265.
[2] *Revue Générale de Droit International Public, loc. cit.*
[3] *Journal du Droit International*, 1917, p. 72.
[4] Fauchille, *Traité de Droit International Public*, Vol. II. 1921. §§, 1490–1493.
[5] E. Pchédécki, *Le Droit international maritime et la grande guerre*, 1916, p. 218.
[6] F. Von Liszt, *Das Völkerrecht systematisch dargestellt*, 1918, p. 339.
[7] " Le droit d'angarie " in *Revue de Droit International et de Législation comparée*, 1920, No. I (3rd Series, Vol. I.), pp. 19–33.

It will be convenient at this point briefly to recapitulate the development of angary from its origins to the present day as illustrated in the preceding sections. The term derives from the designation of the ancient Persian courier-service. From Greek it passed into Latin and from Roman law was absorbed into the juridical phraseology of medieval Europe. Throughout the Middle Ages and at least as late as the end of the seventeenth century it continued to be used in the sense which it had borne in the *Corpus Juris*, but gradually tended to be applied primarily to requisitions of ships, whether foreign or domestic. The majority of the seventeenth-century jurists saw in angary an exercise of the right of sovereignty possessed by a State over all property even temporarily within its jurisdiction. There was, however, another school of thought, represented in particular by Grotius [1] and the " Naturalists," who held that foreign property was inviolable except by virtue of the *jus necessitatis*, which revived the primitive communion of things; but writers of this school are generally careful to avoid the use of the term *angaria*, as one which had always implied an exercise of sovereign prerogative. At least as early as the beginning of the eighteenth century angary (particularly in its form *angariatio*) began to develop a still more narrow connotation, namely the requisition of foreign (or, in time of war, *neutral*) shipping, although it is not until the nineteenth century that the *jus angariae*, *droit d'angarie* or right of angary is commonly adopted by a majority of authorities as a term of international law to denote the latter class of requisitions to the exclusion of all others.

So far, wherever the word is employed, it is possible to detect two main underlying ideas : firstly, *angariae* are counted among *regalia*, *i. e.* the exercise of angary is regarded as a prerogative of sovereignty; and, secondly, what may be called the original *transport* element is always present,[2] *i. e.* the term is used to denote requisitions by the sovereign of what the Germans (in portmanteau form) conveniently call *Transportmitteln*. I have not found it before the nineteenth century in the sense in which most modern jurists in the years immediately preceding the war spoke (and Rolin in 1920 still speaks) of angary as the right of a belli-

[1] Grotius on this point at least takes a decidedly " naturalist " view.

[2] We need take no account in this connection of the extension of the word *angaria* in medieval Latin (through a false derivation from *ango*) to denote any kind of burden, hardship, or even mental anxiety.

gerent to requisition all kinds of neutral property; and I suggest that such a use, despite its general adoption in recent years, is etymologically and historically unsound. Concurrently with this change of meaning the theory that angary is a belligerent right *based on military necessity* has gradually permeated modern text-books, a result which has perhaps to a large extent been brought about by the influence of the doctrine of Grotius and the "Naturalists" that foreign property temporarily within a State is not subject to that State's right of eminent domain, and by the failure to notice the careful avoidance of the term *angaria* in the writings of this school.

But if the term be thus generalised it is questionable whether it should be employed at all. Should we not in preference speak of the belligerent right of requisition in case of military necessity? Angary, if used to denote all classes of belligerent requisitions of neutral property, is a misnomer, for it is in reality a right *sui generis*. The doctrinaire may argue that such a right is out of place in modern international law and urge its abolition; but he should at the same time expunge the word altogether from his vocabulary, not apply it as a label to something essentially different. In effect, the events of the war and the fresh precedents which have been established for the exercise of angary by neutral Powers have helped to clear away modern accretions which had in recent years tended increasingly to obscure its essential features, and have enabled us to recover a conception which is in strict accordance with the etymological, historical and juridical development of the right. For, if it can be invoked to justify the requisition by a neutral of foreign shipping—whether the property of a belligerent or not is immaterial—it is clearly not a belligerent right pure and simple, nor can it be explained on a basis of military necessity.

In reality angary is and has always been a *droit régalien*, a special application of the right of sovereignty, which gives a State an unquestionable competence over all property within its territorial jurisdiction. Another manifestation of this same competence is to be found in the application of the municipal law and police and sanitary regulations of a country to all vessels using its ports or passing through its territorial waters. Let us examine the celebrated Duclair incident in the light of the foregoing remarks. Two of its most salient features were: (*a*) that the English ships affected were requisitioned not for

transport purposes, but solely with a view to their destruction in order to block the channel of the Seine; and (*b*) that the requisition was made by invading forces in occupied enemy territory. Both these features are, I suggest, incompatible with the true conception of angary. Blüntschli says as much,[1] while Perels draws a clear-cut distinction between *Angarieen* and *Vernichtung* of neutral shipping; Geffcken, too, differentiates in a rather halting fashion between the " mere destruction of neutral property in consequence of the necessity of war " and " its use by a belligerent for his own ends," though he finally classifies both acts under the head of angary. We may not unreasonably deduce that these two latter authors, no less than Blüntschli, felt a certain difficulty in classifying this incident as a case of angary, but they do not grapple seriously with the problem, and the sinking of these seven English colliers at Duclair has become the standard illustration of angary in modern text-books. Yet in the first place, unless we are to ignore etymology and history alike, it is of the essence of the true right of angary that it shall be a requisition of means of transport *for purposes of transport*, and the sinking of these ships is, therefore, no more a case of angary than would be the use by a belligerent for the same object of a quantity of cement of neutral ownership in course of transit through occupied territory. That the laws of war would allow the requisition of such material in the event of extreme military necessity is unquestionable; but it would not be a case of angary.

In the second place angary is a right of sovereignty, and a belligerent does not possess the right of sovereignty in occupied enemy territory; that theory has no foundation in law and has long been abandoned by all reputable jurists, as Oppenheim demonstrates very clearly in an article published in 1917 in the *Law Quarterly Review*.[2] After writing of the " nowadays untenable theory that the occupant is for the time being the sovereign of the occupied territory," he continues :—

" As regards *the kind of authority* an occupant possesses, Hall and others correctly describe it as mere military authority. Occupation is merely a phase in military operations which will only last a shorter or longer time unless it turns into subjugation or into rightful possession by cession. *There is not an*

[1] " Les troupes allemandes . . . n'y étaient point autorisées . . . par le droit d'angarie (*jus angariarum*)." *Le droit international codifié*, 1895, §§ 793 and 795 *bis*.

[2] *The Law Quarterly Review*, Vol. XXIII. (1917), pp. 363–370.

atom of sovereignty in the authority of the occupant, since it is now generally recognised that the sovereignty of the legitimate government, although it cannot be exercised, is in no way diminished by mere military occupation."

The legality or otherwise of the action of the German military authorities at Duclair must, then, stand or fall simply by consideration of the extent of a belligerent's rights in time of military necessity. It has no connection at all with angary, and as an illustration of this right it should disappear from our text-books. It is surprising that Harley, who specifically derives the right of angary from territorial sovereignty, should retain the Duclair incident as a typical example and in view of it define angary as including the right to *destroy* neutral vessels. The British Government, too, in the memorandum annexed to Mr. Balfour's despatch to M. Swinderen of April 25, 1918, despite a reasoned and lucid statement of the view that angary is a right of sovereignty, cite this case as an instance of angary, though suggesting, it is true, that it is hardly typical.

However, the Duclair incident, having found its way into the text-books, has exercised a marked influence on the whole subsequent development of the theory of the right. Rolin-Jaequemyns, writing in 1871, comments that " n'aucun auteur en parlant du droit d'angarie ne prévoit, à notre connaissance du moins, l'hypothèse de la destruction des navires neutres saisis." [1] Almost without exception every jurist who has written since that date defines angary as including the right to destroy the neutral property requisitioned. How then are we to account for the unquestioning acceptance of this case as a typical example of angary by almost all modern authors?

Bismarck's reference (in the diplomatic correspondence subsequently exchanged between the governments of Great Britain and Germany) to the *jus angariae* and to Phillimore's definition of the right is undoubtedly responsible. But, if we examine the relevant passage a little critically, we shall find that he did not assert that the sinking of these vessels at Duclair was a case of angary; if anything he actually implied the reverse! His actual words were as follows :—

" I take this opportunity of calling to mind that a *similar* right in time of war has become a peculiar institute of law, the *jus angariae* which so high an authority as Sir Robert Phillimore defines thus," etc., etc.[2]

[1] *Revue de Droit International et de Législation Comparée*, Vol. III. p. 571.

[2] See *English State Papers*, 1871 (35).

In effect he wished to show that, in certain circumstances, neutral property ceased to be inviolable and that this fact was well recognised in international law, as for example, in the case of the right of angary. There is, moreover, confirmatory evidence that Bismarck did not intend to suggest that the Duclair incident was a case of angary; for Phillimore holds that angary can only be exercised subject to payment of freight in advance, and on condition that the owners of the goods or vessels are " indemnified for all damages caused by the interruption of their lawful gains and for the possible destruction of the things themselves," [1] whilst Bismarck stoutly denied any liability to pay an indemnity, though expressing his readiness to grant compensation as a special concession in view of the then German friendship with England. The Iron Chancellor and his shrewd legal advisers were assuredly not so short-sighted as to have called evidence *against* themselves !

The right of angary, then, inasmuch as it derives from territorial sovereignty cannot be exercised in occupied enemy territory. Similarly, there cannot be, as Oppenheim, for example, and, very illogically, de Cussy [2] would have it, any right of angary on the open sea. The case of the *Petrolite* in which in December, 1915, an Austrian submarine held up a United States merchantman on the high seas and compulsorily requisitioned provisions (with other acts of violence which are not here relevant) is not, therefore, an example of angary, although cited as such by Stowell and Munro.[3] There is no need here to investigate the legality of belligerent requisitions on the high seas, which is simply a question of what measures are and what measures are not legitimised by extreme military necessity; but such requisitions have nothing to do with the law of angary.

The requisition by a belligerent of neutral railway material is also cited by Oppenheim and others as " a special application of the right of angary." Such requisitions are now regulated by Article 19 of Convention V of the Second Hague Peace Conference, which permits the neutral whose rolling-stock has been requisitioned, in case of necessity to retain and make use of rail-

[1] Phillimore is, of course, thinking of destruction by the other belligerent at sea, shipwreck, etc., etc.; he is not suggesting the possibility of a requisition being made with the definite object of destroying the ships requisitioned.

[2] Since De Cussy regards angary as an exercise of the right of sovereignty.

[3] Stowell and Munro, *International Cases*, Vol. II. (1916), pp. 551–5.

way material coming from the territory of the belligerent concerned to a corresponding extent. Is this a case of angary? Basdevant, although he takes the view that the right derives from territorial sovereignty cites this article as a typical example of angary and remarks :—

"il y a là un parallelisme entre les prérogatives du neutre et celles du belligérent qui ne permet pas de les expliquer par une qualité qui n'appartiendrait qu'à l'un d'eux. Il faut chercher une explication commune et c'est une raison de plus de voir dans le droit d'angarie une application de la compétence territoriale de l'Etat." [1]

This is, I think, fallacious inasmuch as it is unquestionable that the belligerent has *not* got the same right of sovereignty in occupied enemy territory as a neutral State possesses within the confines of its own territory. Moreover, it may be questioned whether the neutral is exercising his undoubted right of angary, for Article 19 places very definite limitations upon his power to requisition, limitations the nature of which is wholly foreign to angary proper. It is only the rolling-stock of the belligerent who is using his own material that the neutral is authorised to requisition; and that only "à juste concurrence." In fact, if we wish to find a juridical label for the neutral's action, we should strictly term it a case of "negative reprisals" or "retorsion." Angary, on the other hand, would give the neutral the right to utilise rolling-stock belonging to the belligerent or any other foreign Power, and the quantity of such stock which it would be permissible to requisition would be determined solely in relation to the neutral's needs.

The old law of angary has undergone two important modifications in the course of the last century. In the first place, requisitions in former days were not confined to the ships themselves, but, as has already been pointed out, were generally extended also to the personal services of the crews. As the British Government stated in the despatch addressed to the Dutch Government cited a few pages earlier, "such compulsion would not be in accordance with modern ideas." Indeed, Perels is almost the only twentieth-century authority who holds that the services of a neutral crew can be requisitioned. The example set by the Governments of Great Britain and the United States in 1918 may be taken as final on this point. Secondly, the

[1] *Revue Générale de Droit International Public*, Vol. XXIII. (1916), pp. 268 ff.

circumstances in which the old right of angary could be exercised were never very clearly determined. As we have seen, De Réal held that a sovereign could requisition foreign shipping in the event of " un simple besoin "; and Azuni was of opinion that a mere public utility would suffice. It is clear that to-day such requisitions would not be either attempted or excused for purposes of a voyage of discovery or the acquisition of fresh territory. There must be a real emergency such as civil disturbance, plague, famine, earthquake, or war to justify the exercise of the right of angary in the twentieth century, and a real need for the services of the ships or other means of transport affected on the part of the requisitioning State. This, however, does not mean that there must be immediate military necessity or that the very existence of a State must be at stake before such requisitions can be made. The services of the Dutch vessels taken over in 1918 were undoubtedly at that time indispensable to the well-being of the British and American peoples.

How then should the right of angary as it exists to-day be defined? An analysis of a modern definition formulated in the light of international practice during the late war may be helpful.

Harley defines the right of angary as follows :—

> " The right of angary is the right of a State in time of war or public danger to requisition for its own use or even to destroy vessels of other Powers lying within its jurisdiction. It may be exercised only in case of urgent public necessity, and the owners of the vessels must be fully compensated for the use of their ships; reasonable provision for the crews must be made."

This definition is satisfactory except in two important particulars.

(1) It confines the right of angary to vessels. Is there any real reason for so confining it? Historically there is none. In Roman law *angariae* were requisitions of all kinds of *land* transport and the application of the term to ships was secondary and comparatively rare, and up to the end of the seventeenth century the word was regularly employed in the former sense. To Huber,[1] for example, writing in 1694, *angariae* are still to be distinguished from *praestationes navium*. Schmittau,[2] in his *De Transitu Militum* also describes *angariae* as requisitions of land transport based on territorial sovereignty, so that no one but the *dominus territorii* or those acting with his authority or consent

[1] V. Huber, *De Jure Civitatis*, 1694, Cap. VII. 63.

[2] E. Schmittau, *De Transitu Militum*, in the *Dissertationes Stryckianae*, Vol. III. Disput. VII. M. 2, Sect. 4 (in *Opera Omnia J. S. Stryckii*, 1743).

have the right to impose them.[1] So much for the theoretical aspect; what is the position from a more practical standpoint?

To-day it is perhaps more likely than ever before that means of transport other than ships, in particular aircraft (whether heavier or lighter than air) and motor-cars, will be to an increasing extent found in transit in foreign countries and so temporarily within their jurisdiction. There seems to be no reason whatever why the power of a State to requisition these other means of transport found within its jurisdiction equally with ships should not be classified under the right of angary. It is possible that the reason the term angary tended to become confined to ships in the seventeenth and more particularly in the eighteenth and nineteenth centuries was a very simple one, namely, that other means of transport were seldom found within foreign jurisdiction. For example, it is likely that in the eighteenth century the number of English-owned horsedrawn vehicles (such as coaches, etc.) temporarily on the Continent for purposes of some journey or pleasure tour was negligible. The advent of motor-cars and improved shipping facilities has, however, wrought a radical change in the twentieth century; and to-day it is probable that several hundred English-owned motor-cars are touring the Continental roads every year, in the summer months in particular. It is quite conceivable that in time of national emergency the government of a country through which such vehicles were passing might require to put them in requisition. In the event of a sudden invasion it might be necessary for the military authorities to lay hands on every motor vehicle within reach to rush troops to a threatened point or to ensure the maintenance of vital supplies by road; for the importance of adequate road transport in modern warfare cannot be exaggerated, as the course of events in the late war clearly demonstrated. The impressment of neutral motor-cars touring in the country concerned would be justifiable in such circumstances and would be a legitimate exercise of the right of angary, although in view of the great inconvenience which would necessarily be caused to neutral owners and passengers modern governments would not lightly have recourse to such a step.

[1] In Craig's *Jus Feudale* (1603) we find the term applied indiscriminately to requisitions of land transport (including draught animals) and sea transport. He writes: "Apud nos etiam quaedam sunt angariae, quales sunt praestationes ad deducenda tormenta aenea, si quo opus est; apud Anglos (he is dealing primarily with Scotch practice) plures. Sic non solum jumenta, boves, plaustra sed etiam naves *angariariae* dicuntur, cum necessitate ad onera publica transfretanda astringuntur."

As regards aircraft, the analogy with ships is very close, and clearly in the event of war, civil disturbance, etc., etc., a State might well have to requisition foreign-owned aircraft temporarily within its jurisdiction at the time of the occurrence of the emergency, in order to utilise them, for example, for the carriage of despatches. If the aircraft in question were at rest on an aerodrome they would clearly be within the State's territorial jurisdiction and liable to requisition under the right of angary. What if at the time they were flying in the air above the State's territory or territorial waters, possibly in course of transit to a neighbouring State and with no intention of landing *en route?* The maxim of municipal law, *cujus solum ejus est usque ad coelum* has become a generally accepted tenet of international law, and the International Air Convention,[1] 1919, lays it down that the subjacent State has a right of sovereignty over the whole air space above its territory or territorial waters to an indefinite height. In these circumstances there is no doubt that in strict law the right of angary would authorise a State to intercept foreign aircraft passing over its territory at whatever altitude and compel them to land in order that they might be employed for some purpose of public utility in connection with the emergency.

(2) The other unsatisfactory feature about Harley's definition is that it allows the requisition of vessels with the definite intention of destroying them. Military necessity may justify such action, but, as I have endeavoured to show, the right of angary was never intended so to do, inasmuch as it denotes the right to requisition means of transport for purposes of transport. As has already been pointed out, until after the occurrence of the Duclair incident in 1870, the idea of deliberate destruction was wholly foreign to the conception of angary. It is high time that this nineteenth-century accretion was cleared away; it has led to much confusion of thought.

The essential features of the modern law of angary are then, it is suggested, as follows :—

(*a*) It is the right of a State to requisition foreign ships, aircraft and other means of transport, which

(*b*) are urgently required for purposes of transport and which

[1] Which is, however, not yet ratified.

(*c*) are at the time of requisition within its territorial jurisdiction; but such requisitions can only be made

(*d*) in time of national emergency and

(*e*) subject to payment of full compensation, whilst

(*f*) the services of foreign *personnel* (as for example the crews of ships and aircraft) cannot be compelled in any circumstances.

Harley's definition may, therefore, be re-modelled and amplified on the following lines :—

The right of angary is the right of a State in time of war or public danger to requisition for its own use ships, aircraft, rolling-stock and other means of transport belonging to the nationals of other Powers but lying within its jurisdiction at the time of requisition. The right does not extend to the personal services of the crews, etc., if they are foreign nationals, and reasonable provision must be made for them. It may be exercised only in time of urgent public necessity, and the owners must be fully compensated for the use of their property.

THE HISTORY OF INTERVENTION IN INTERNATIONAL LAW

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THE subject of intervention [1] is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all. A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland. In what purports to be a code of international law, Bluntschli gives no leading definition of a word which is employed in three distinct portions of the book with at least two different meanings. Yet these methods of treating intervention are but natural consequences of the darkness which besets a subject, at no time clear and even now in a fluid condition.

With reference to the rest of the system of international law, intervention presents difficulties in its relation to independence and to war.

" The right of independence," says Hall, " is a right possessed by a state to exercise its will without interference on the part of foreign states in all matters and upon all occasions with reference to which it acts as an independent community," [2]

and intervention, we are told,

" takes place when a state interferes in the relations of two other states without the consent of both or either of them, or when it interferes in the domestic affairs of another state irrespectively of the will of the latter for the purpose of either maintaining or altering the actual condition of things within it. *Primâ facie* intervention is a hostile act because it constitutes an attack upon the independence of the state subjected to it." [3]

[1] Two recent monographs on intervention are H. G. Hodges' *Doctrine of Intervention* (1915), and Ellery C. Stowell's *Intervention in International Law* (1921). The latter is reviewed elsewhere in this volume.

[2] W. E. Hall, *International Law* (7th ed., 1917), § 10.

[3] *Ibid.*, § 88.

Why then should it be treated differently from any other breach of the state-independence rule? The general rule of non-intervention seems an obvious corollary from the state-independence rule, and the cases in which the former may be set aside might apparently have been equally well discussed as exceptions to the latter.

Again, there appears to be no distinction between forcible intervention and war. Should such prove to be the case, the causes which justify the one would also support the other. But, as a matter of fact, the causes of war are practically infinite and are beyond the scope of international law, apart from the exceptional case of a clear breach of it.[1] Theoretically, for the international lawyer, war should be permissible when, and when only, some rule of his system is violated and redress is persistently refused. In practice it is impossible to frame general rules of any real value. On the other hand, the causes which confer upon one state the right of intervening in another are regarded as clearly definable by nearly every modern jurist,—though little agreement exists as to what precisely those causes are. Yet they are regarded as comparatively few in number,—certainly not identical with the causes which justify war. Unless, therefore, some difference can be established between a forcible (or, more exactly, belligerent) intervention and other wars, it is hard to see why modern international law should undertake the task of classifying the grounds which legalise the former, while professing its incompetence to systematise those upon which the latter can be based.

An attempt will be made in this essay, first, to trace the word to its origin and note the modifications it has undergone, and secondly, to ascertain its present meaning.

Section I.—History of the Word.

At the outset it may be stated that intervention now appears to have three disparate significations—that of interference in the relations of two other states, that of interference in the internal disputes of a single state, and that of some measure of redress falling short of war directed by one state against another for some alleged breach of international law committed by the latter. The distinction between them will be elaborated later.

[1] W. E. Hall, *op. cit.*, § 16.

For the present, it is sufficient to denote them for convenience' sake as External, Internal, and Punitive Intervention, respectively, and to say that the first and third are probably not so much offshoots from, as later parasitic growths upon, the second. For the sake of brevity and in the absence of any statement to the contrary, "intervention" will be confined in this section to "Internal Intervention."

The word has a comparatively recent origin. No trace of any phrase corresponding to it is discoverable in the *De Jure Belli ac Pacis* of Grotius. Acts of violence which have been treated in latter-day international law as interventions, Grotius regards as ordinary wars. Thus, the point he raises in Bk. II. c. xxv. § 8 as to whether war be just if waged by one state for the purpose of checking the oppression of its subjects by another state would now be generally discussed as "Humanitarian Intervention." So far from imagining that there might be that intermediate state between peace and war nowadays denoted "intervention," Grotius expressly negatives any such idea by citing Cicero to the effect that between war and peace there is no medium.[1]

Vattel requires careful examination. Not that he formulates any detailed theory of intervention in his *Droit des Gens*—for the word is used but twice, and certainly not with the technical meaning now annexed to it—but because there is every reason to believe that some passages scattered throughout the book are the *nidus* of the modern doctrine relative to intervention. These are :—

Bk. I. § 37. "Enfin, toutes ces choses n'intéressant que la nation, aucune puissance étrangère n'est en droit de s'en mêler, ni ne doit y intervenir, autrement que par ses bons offices, à moins qu'elle n'en soit requise, ou que des raisons particulières ne l'y appellent."

Bk. II. § 54. "C'est une conséquence manifeste de la liberté et de l'indépendance des nations, que toutes sont en droit de se gouverner comme elles le jugent à propos, et qu'aucune n'a le moindre droit de se mêler du gouvernement d'une autre."

Ibid., § 55. One sovereign cannot make himself judge of the conduct of another.

Ibid., § 56. How it is permitted to enter into the quarrel between a sovereign and his subjects ("d'entrer dans la querelle," etc.). When a people from good reasons takes up arms against an oppressor, justice and generosity require that brave men should be assisted ("à secourir de braves gens") in the

[1] *Op. cit.*, Bk. III. c. xxi. § 1, sub-sec. 1.

defence of their liberties. Whenever, therefore, civil war is kindled in a state, foreign powers have the right of assisting ("peuvent assister") that party which appears to them to have justice on its side. He who assists an odious tyrant, he who declares for an unjust and rebellious people, offends against his duty.

Ibid., § 57. The right of not suffering foreign powers to interfere ("se mêler") in the affairs of government.

Ibid., § 197. An ally should be defended against every invasion, foreign violence and even against his own rebellious subjects. But if the nation has formally deposed its king or expelled its magistrates, to oppose these domestic regulations, by disputing their justice or validity, would be to interfere ("s'ingérer") in the government of the nation (see II. § 54) and to do it an injury.

Bk. III. § 49. How he who breaks the equilibrium may be restrained or even weakened. Confederacies are the best way of preserving the equilibrium. If an aggrandised prince make an unjust war, everyone has a right to succour the oppressed; if he make a just war, neutral nations may interfere ("s'entremettre") as mediators for an accommodation and induce the weaker side to offer equitable conditions to him. Thus the interposing nations ("les nations intervenantes") can secure him a just satisfaction.

Ibid., § 296. (The chapter is headed "Of Civil War.") Conduct to be observed by foreign nations. They are not to interfere ("s'ingérer") in the internal government of an independent state (II. § 54). They may, however, interpose their good offices for the restoration of peace. . . . If this mediation prove fruitless, they who are not tied by any treaty may . . . assist the party which they shall judge to have right on its side, in case this party shall request their assistance or accept the offer of it . . . from the very same reason that they are at liberty to espouse the just quarrel of a nation entering into war with another.

A scrutiny of these sections yields results which may be thus summarised :—

(1) The word "intervention" is nowhere employed in a technical sense. In Bk. I. § 37, it signifies meddling in the internal disputes of another state; in Bk. III. § 49, mediation by a third power between belligerent states. Phrases which occur with far greater frequency are "se mêler," "s'ingérer."

(2) Bk. II. § 54, contains, in all probability, the germ of the modern rule of non-intervention. As Vattel enunciates it, it seems a re-statement of the independence rule from the negative side. But that it was not a vain or unnecessary repetition is proved by the most cursory survey of the times in which Vattel lived. There were events in the age extending from the Peace of Utrecht to the Treaty of Vienna which might have justified serious speculation as to whether the rules of morality applied as between states. Even while Vattel wrote Frederick II's plunder of Silesia in direct contravention of his father's guarantee

of the Pragmatic Sanction and of the principles set forth in the "Anti-Machiavel" must have been fresh in his memory. In 1738 the "Hats" of Sweden were stimulated by French bribes to attack their rivals, the "Caps." The very king in whose diplomatic service Vattel was employed—Augustus III of Saxony—had been forced as a ruler upon the recalcitrant Polish nation by the arms of Russia and Saxony. Honourable conduct between monarchs was but too often observed only so long as no temptation existed to abandon it.

Amidst such international practice as this, Vattel declared that each state, subject to the rights of others, was entitled to live its own life in its own way. Was it remarkable that this rule, the pillar upon which the whole fabric of international law rests, should require some reassertion when national policy was so frequently pursued to the prejudice of international rights? And if the cavalier fashion in which the rule was treated urged Vattel to insist the more earnestly upon it, its frequent infraction afforded equal reason for its re-statement by those who followed him. Of succeeding generations, the first saw the partition of Poland and the premature interference of France in the struggle between England and her revolted American colonies; the second, the chronic interventions of the Holy Alliance; the third, the interference of Russia in Turkey which led to the Crimean War. Occasions have never been lacking to justify international lawyers in vigorously fortifying the keystone of their system.

(3) Vattel makes no attempt to typify any hard-and-fast doctrine by this "interference." It was for other jurists at a later date to weave the threads we find here and there throughout his book into the web of rules relative to "intervention." It is impossible to say whether the idea of external intervention is attributable to Bk. III. § 49.

Among the treatises of the jurists who flourished in the half-century after Vattel, little trace of the word "intervention" can be found, though a chapter or a section in almost every book was devoted to the doctrine it now represents, but which then passed current under other names. Without tediously entering into detail, it may be said that "intervention" did not become a technical phrase till the dozen or so years bounded by 1817–1830. This must not, of course, be taken as a rigid line.

In Ward's *History of the Law of Nations*, one of the results

noted as attributable to the Feudal System is "the *right* to interfere, which the states of Europe mutually assumed in consequence of the divisions and sub-divisions into which they had fallen."[1] In Bohm's French translation of Schmalz's *Das europäische Völkerrecht* we find "intervention" discussed in a chapter dealing with the rights of a nation with reference to the selection of its own constitution.[2] This translation was published in 1823. On the other hand, three years earlier, G. F. de Martens, in a third edition of his *Précis du Droit des Gens moderne de l'Europe*, handled a subject precisely similar to that which Schmalz considers, but employs "s'immiscer," "se mêler" instead of "intervenir."[3] The latter word occurs in Bk. III. § 105, but in the unusual sense of interference by one state in another to secure pardon of the former's subjects. The phrase used in Klüber's *Le Droit des Gens*, the first edition of which was issued in 1819, is "se mêler."[4] The first volume of Kent's *Commentaries* (published in 1826) contains a brief discussion of the "rule of interference"; the "right of interposition" is a mere variant of this. The former appears to be nothing more than the rule of self-preservation, while the latter is a vague rendering of Vattel's Book II. § 56. Pinheiro-Ferreira, who annotated de Martens in 1833 and Vattel between 1835–6, talks of "intervention," and sufficient technicality had gathered round the word in 1835 to enable Gericke to publish a monograph entitled *De Jure Interventionis*.

The older terms were not, however, ousted. "S'ingérer," "s'immiscer," "se mêler" constantly occur in state papers and in treatises on international law. Statesmen have naturally lagged far behind publicists, both in adopting any specific word and in attaching any definite meaning thereto. Castlereagh, Canning and Palmerston, whose political experience included a sufficient acquaintance with intervention, almost invariably talk of it as "interference." The Spanish "intervencion" is translated by "interference" in a despatch of 1822.[5] "Intervention" becomes common so much earlier on the Continent than in England that it is obviously a foreign importation into this country. In the despatches relative to the Congress of Verona "intervention" and "meddling" are synonymous terms in the

[1] *Op. cit.*, Vol. I. p. 367.
[2] *Op. cit.*, Bk. IV. ch. ii.
[3] *Op. cit.*, Vol. I. §§ 74–76, 81.
[4] *Op. cit.*, Pt. I. title i. ch. ii. § 48.
[5] *British and Foreign State Papers*, 1822–3, p. 18.

minds of Metternich and Nesselrode. Another English variant is " interposition."

Thus " intervention " as a word is of modern growth. But the group of ideas which it represents is, as we have seen, as old as Vattel. The process which resulted in the gradual substitution of " intervention " for the cognate terms, " ingérence," " se mêler," " intermeddling," " interposition," was nothing more than a change of verbal raiment. What then was the doctrine covered by this confused nomenclature? The key to it lies in the juxtaposition of two sections in Vattel. Hard upon the general proposition that no state has the least right to meddle in the government of another,[1] follows an examination of " How it is permitted to enter into the quarrel between a sovereign and his subjects." [2] Here then we have a rule, which, as we have noticed, and as Vattel himself states it, is a corollary from the state-independence rule,[3] followed by an exception. This exception might, seemingly, have been just as well affiliated to the leading rule instead of being annexed to the intermediate deduction therefrom. But, as has already been pointed out, what may appear a simple enough matter in the twentieth century was a debateable point in the eighteenth. A statesman, who might have conceded the general proposition that nations were independent, would have hesitated to admit that he was thereby estopped from tampering with the government of another state. The rule of non-interference, as stated by Vattel, practically consists of two branches. It forbids usurpation by one state of a part or the whole of the functions of government in another state :—

(α) When no dispute exists between the citizens and government of the latter;

(β) When such a dispute does openly exist. In the first case the prohibition is absolute; in the second, an exception is allowed under § 56. The most frequent infractions of the rule have occurred under (β), partly because the weakness produced by internal dissensions renders a state an easy prey to the designs of an unscrupulous neighbour, partly because revolutionary factions of all ages and nations have met with a sympathy or disapprobation from bystanders which has often evinced itself

[1] *Op. cit.*, II. § 54. [2] *Op. cit.*, II. § 56.
[3] Stated in Vattel's Introduction, § 15.

in assistance for the promotion or defeat of their ends, as the case may be.

The double meaning which " interference " thus started with has been reproduced in the modern " intervention,"—the loose and wide signification of (α) and the clear, definite one of (β).

The mode in which the jurists of the early nineteenth century treated the subject is typified in de Martens' work. There is a vague, general proposition that a state is entitled to select its own form of government. Taken by itself, this might not appear to be a very valuable or intelligible proposition in the presence of the state-independence rule. But it at once catches significance from the definiteness of the subject to which it usually serves as an introduction,—the topic of interference by one state in a change of government, violent or pacific, in another. That this topic merited careful treatment is obvious when we consider the practice of the time. Nowadays the non-intervention rule appears to be a patent consequence of independence with a host of disorderly exceptions fastened upon it. No jurist would have the hardihood to assert that an honest opinion entertained by one state as to the merits of a struggle in another would justify it in taking part therein. Yet this is no more than Vattel's rendering of the law in Bk. II. § 56. To him and those who came after him, the subject of " how it is permitted to enter into a struggle between a sovereign and his subjects " meant something perfectly clear. They were simply stating, nay, strictly limiting, the international usage of the eighteenth century, when they conferred upon a nation the right to aid a rebel or his government,—a right as real then as that of ambassadorial inviolability is now.

Vattel's successors forged and welded the materials with which he supplied them into a more compact form. But it was some time before " interference " was insulated as a substantive branch of international law, and longer still before it acquired " intervention " as a technical name to the exclusion of other cognate terms. Thus de Martens devotes some connected sections to a discussion of the general rule that a state may choose its own form of government, and then, without any formal preface or heading, plunges into an examination of the cases in which interference is permissible. We have already noted that he does not style it " intervention." As the first edition of the *Précis* was published in 1788, this is evidence that the doctrine

was taking shape at least as early as that date. On the other hand, " intervention " was hardening as a term of art during a period extending roughly from 1817 to 1830.

The reason for this swift evolution probably lies in the fact that a closer investigation of what were *primâ facie* gross infractions of the quickened conception of independence was forced upon jurists by the very frequency of their recurrence. There was no lack of examples upon which to base generalisations, when the Holy Alliance exploited their principles in Naples and Spain, when Greece and Belgium owed their existence as independent states to the assistance of other Powers, and when French and Austrian interventions counterbalanced one another in Italy,— all within the brief space of twelve years (1820–1 to 1831–2). These events exhibit the common characteristic of interference by one or more states in the internal dissensions of others.

After this period there was a distinct reaction in favour of the rule of non-interference. The breaches of it, though flagrant, have never been the fruit of a policy adopted by several states banded together, as were Austria, Russia and Prussia in the so-called Holy Alliance, with the definite object of organised suppression of revolutions in neighbouring states.

Englishmen are inclined to pride themselves upon the adherence of their rulers to the principle of non-intervention. Yet we should do well to recollect that Castlereagh, whose Circular Despatch of 1821 is regarded in some quarters as the *locus classicus* of this doctrine, was the minister who in 1814 despatched a British fleet to punish the Norwegians because they refused subjection to a Swedish king whose fitness for governing them lay in the fact that his candidature had been suggested by a Russian Czar and backed by English, Prussian and Austrian cabinets. Since 1830 there has been, upon the whole, a steady improvement in the conduct of states with respect to the rule of non-intervention.

And long before the gospel of Metternich had ceased to win converts in the Courts of Europe, the substance of the change was foreshadowed. Even Châteaubriand, who, above any other French statesman, spurred his country to intervene in Spain in 1823, who openly declared that Spain was the true battle-field of France and that intervention or non-intervention was a piece of childishness with which no thoughtful man would trouble himself, struck a very different note when, two years earlier, he

had asserted his readiness to go and live at Constantinople if civilised Europe wished to impose a constitution upon France.[1] Moreover, the most scandalous interventions have always produced champions to vindicate the outraged rule. The proceedings which led to the partition of Poland evoked the denunciations of Mackintosh, and Napoleon's interference with, and conquest of, Switzerland in 1798, those of Fox and Mackintosh. Canning reprobated the conduct of the Holy Alliance towards Naples, in 1820, and Palmerston that of Russia towards Hungary, in 1849.

Section II.—Varieties of Intervention.

We are now in a position to examine the modern meaning of intervention.

It will be found that, in spite of a perplexing vagueness which enshrouds the word, it may be used in any one of three tolerably definite senses. The first and by far the most frequent of these is that of interference by one state between disputant sections of the community in another state, the matter of dispute being usually, but not invariably, some constitutional change. This is the interpretation which has been put upon "intervention," "interference," "intermeddling," "ingérence," "se mêler," "intervenir"—all of them coins from the same die—in the above historical sketch. A second meaning which intervention may bear is that of a punitive measure adopted by one state against another in order to compel the latter to observe its treaty engagements or redress illegal wrongs which it has inflicted. Lastly, intervention may signify interference by one state in the relations—generally the hostile relations—of other states, without the consent of the latter. This we have styled External Intervention.

We proceed to consider these meanings in detail.

§ 1. *Internal Intervention.*

It may be laid down at the outset that, as state-independence is the foundation of modern international law, non-intervention is the rule, intervention the exception. The point need scarcely be laboured, for no jurist of the nineteenth century with whose work we are acquainted has been sufficiently pessimistic to invert

[1] *Congrès de Vérone*, Tome I. pp. 73, 100, 125, 314, 364; *Œuvres complètes de Châteaubriand*, xviii. 392.

the relation, with the exception of Gericke, who regarded intervention as the rule since the French Revolution. It must be admitted that the history of the forty years preceding the date at which Gericke wrote (1835) made this deduction plausible. From end to end of Europe there was scarcely a single country whose inner life had been neither vexed by the storms of the Napoleonic era nor imperilled by the sullen waters of European politics,—troubled long after the Congress of Vienna. Cardinal Bernetti's blunt reminder to the Marches that the Powers would never be indifferent to the disturbances which might break out amongst them re-echoes the spirit of the age.[1]

Whatever may be the immediate reason of an internal intervention, its primary cause is the abnormal condition of the state interfered with, and it is precisely this *abnormality* which, we think, is the niche wherein intervention (not merely internal, but external, as will be shown under that heading) should be placed in a scientific classification of the topics of international law.

A state may, with reference to its internal economy be in—

(*a*) A normal condition—free from internal dissensions;

(*b*) An abnormal condition—torn by intestine strife. In this case, the conduct of other states may, in respect of the state thus afflicted, be normal (non-intervention) or abnormal (intervention). Thus the discussion of intervention is closely allied with that of the diseased condition of the body politic. The appropriate remedy, as a rule, is not the surgery of intervention, but the expectant treatment of non-intervention.

As to the amount of meddling necessary to constitute intervention, there must be actual compulsion or the threat thereof. And by threat is to be understood a direct or indirect request by one state to the parties or one party in the contest to do or refrain from doing something upon pain of violence. This at least is the characteristic of that intervention, whether external or internal—for what is said upon this point is equally applicable to both—which is *primâ facie* an infraction of international law.

The term has, however, been extended to mean a friendly attempt by third parties to reconcile disputant states or parties in a state. Its employment in this sense is regrettable, for it tends to confound advice given for keeping or making the peace—a moral duty incumbent upon every state—with acts which are

[1] *Annual Register*, 1831.

presumptively a breach of it. Thus, Phillimore seems to think that the expression of an opinion may constitute an intervention,[1] and exemplifies this in the conduct of Great Britain in the civil war between Austria and Hungary, in 1849. But what Lord Palmerston then said in the House of Commons amounted to nothing more than an assertion of the Cabinet's readiness, if required, to counsel friendship and peace.[2] The present and better view is that voiced by Westlake—tender of such advice may be injudicious, but it is not intervention.[3]

We are obliged to take things as we find them, but we would suggest that interference of this kind, if it is to be called intervention at all, should be referred to as Pacific Intervention. "Mediation" might be selected in preference, but it is almost as Protean as "intervention" itself, being applied to taking one side in a quarrel,[4] or settling it by impartial interference,[5] or at the request of both parties,[6] or by means of threatened violence.[7] If, on the other hand, an intention to interfere, without the consent of the objects of the interference, is signified by the utterances of a state organ, this can be regarded as the threat of force which may constitute intervention proper.

If we turn from this "flea-bite" form of intervention and seek the distinction between the most violent form of intervention and war, we find that the surface facts of both are identical: measures of violence adopted by one state and resented and reciprocated by another. The distinction, Hall explains, lies not in the acts of the parties, but in the intention of one of them.[8] The intervener, notwithstanding the hostile character of his conduct and its recognition as such by the state affected, usually regards pacific relations as uninterrupted. The criterion is to be found in the circumstances immediately preceding the attack.

Internal intervention takes place where one state assumes to itself the office of umpire or participant between disputants in another. The claim may be reluctantly acquiesced in, in which case the intervention might be described as non-belligerent; or

[1] *Commentaries upon International Law*, 3rd ed. (1879), Vol. I. p. 599; Oppenheim, *International Law*, 3rd ed. (1920), Vol. I. § 134.

[2] *Annual Register*, Vol. XC. ch. vi.

[3] Westlake, *International Law* (1904), Pt. I. p. 307

[4] Wheaton, *History of the Law of Nations* (1845), p. 539.

[5] Phillimore, *op. cit.*, I. p. 574.

[6] Pradier Fodéré's note to de Martens, II. vi. § 176.

[7] Wheaton, *op. cit.*, p. 289.

[8] Hall, *op. cit.*, § 88.

it may be taken up as the gage of war and then becomes belligerent.

Again, the object of intervention is, as a rule, not the infliction of a blow upon the resources of a state, but the usurpation of some part of its powers of government, in the course of which bloodshed becomes an undesirable but inevitable incident; it is "not a means of obtaining redress for a wrong done, but a measure of prevention or of police, undertaken sometimes for the express purpose of avoiding war." [1] In the estimation of the intervener, his act is not an assault and battery, but a surgical operation. In the absence of any lawful excuse, the patient's recalcitrance must invariably invest the matter with a precisely opposite appearance from the legal standpoint.

The personal view of every intervener is illustrated by the recommendation of Louis XVI to his allies, the Emperor and the King of Prussia, that they should preface their suppression of the Revolution by declaring—

> "That they were obliged to . . . resist the aggression made upon them, which they ascribed neither to the King nor to the nation, but to the criminal faction which domineered alike over the one and the other; that . . . far from departing from the friendly feeling which they entertained towards the King of France, their majesties had taken up arms only to deliver him and the nation . . . that they had no intention of intermeddling in any form with the internal government of the nation, but only desired to restore to it the power of choosing that which really was in accordance with the wishes of the great majority; that they had no thoughts whatever of conquest . . . ." [2]

Again, belligerent intervention differs from other wars in being usually, from the beginning, not a duel, but a three-cornered contest. The enemies of the state are then not merely the stranger, but the stranger allied with those of its own household.

The nature of non-belligerent intervention is tolerably definite and its causes are regarded as capable of limitation. There is no reason, therefore, why it should lose those characteristics because it takes the form of war. Upon this view, the conflict which ensues is a consequence—and generally an unwished for, if not an unintended, consequence—of an act which was originally regarded, by one party at least, as compatible with the maintenance of peaceful relations. Intervention no more ceases to be intervention, because it becomes belligerent, than an insult ceases to be an insult because it is followed by an affray. The

[1] Hall, *op. cit.*, § 88. [2] Alison, *History of Europe*, Vol. II. p. 320.

essence of internal intervention is not war, but interference between disputants.

Hence, so far as his statement refers to internal intervention, Halleck's view seems to be incorrect. He would abandon the attempt to classify the grounds upon which it is justifiable when it becomes belligerent, and considers that the rule of non-interference " must be resolved upon the general principles upon which war is in any case justified." [1]

G. Carnazza Amari seems to have the same idea in his *Nouvel Exposé du Principe de Non-Intervention.*[2] Commenting upon the fact that, in spite of her great victories over France in 1870–1871, Prussia had shown no desire to intervene in the internal government of France, he remarks,

" Cet événement est d'une grande importance, car il montre le principe de non-intervention comme établi aujourd'hui sur une base si solide, qu'une nation victorieuse n'a pas osé le violer, au moment même où ses troupes foulaient aux pieds le sol du vaincu et y dominaient." [3]

But it is submitted that if Prussia had remodelled the French constitution or stepped into the bloody conflict raging in the streets of Paris, this would not have been intervention at all, but merely one of the incidents of the war. For, an essential of belligerent intervention is the original pacific intention of the intervener, and Bismarck could scarcely have been credited with that by the wildest outburst of charity.

The fallacy lies in imagining that there is an universal connection between intervention and interference in the internal quarrels of a state. Internal intervention necessarily implies such meddling, but the converse of the proposition does not hold.

§ 2. *Punitive Intervention.*

In a few rare cases, proceedings styled " interventions " by jurists or statesmen have taken place in which no interference between disputant sections of a community reveals itself. An endeavour will be made to summarise some of these cases in the nineteenth century and to extract the general principles, if any, underlying them. For distinctive purposes we give them the name of " Punitive Intervention."

[1] *International Law*, Vol. I. ch. xvi. § 22.
[2] *Revue de Droit International*, 1873, Tome V. pp. 353 *et sqq.*
[3] *Ibid.*, note to p. 374.

In 1838, France established a blockade on the coast of Buenos Ayres on the alleged ground that two of her subjects had been unjustly imprisoned and that six others had been compelled to serve in the native army.[1] In the same year, on the ground of various grievances, more or less substantial, France instituted a blockade against Mexico which Amari refers to as an intervention.[2]

Refusal by the Mexican Government to make compensation for injuries inflicted upon resident foreigners and their property, coupled with the breach of treaty obligations, prompted England, France and Spain to conclude a convention, on October 31, 1861, in pursuance of which warships and troops were sent to Vera Cruz and a joint proclamation was issued to the Mexicans. England and Spain subsequently dissociated themselves from France upon discovering that the latter intended to interfere in the civil war which had for some time distracted Mexico.

The obstinacy displayed by Greece in refusing to recognise the claims of England with respect to injuries suffered by Don Pacifico and some other British subjects led to a British embargo on Greek shipping in 1850, which appears to have been regarded as an intervention by Cockburn, Gladstone, and Cobden in the House of Commons.

Naval expeditions were despatched against Corea by France and the United States of America, in 1866, to redress, in the one case the murder of a French apostolic vicar, and in the other, the destruction of an American vessel and the massacre of its crew.[3]

The characteristic which stamps in common the conduct of the aggressors in all the above cases is that their acts were measures of redress falling short of war, and it is to that chapter of international law that they are to be referred. They illustrate to a nicety the capricious application of the term " intervention." It is not obvious why it should be used to designate one pacific blockade more than another,—why there should have been an " intervention " in Greece in 1850, but only a " pacific blockade " in 1886. Perhaps the word owes this shade of meaning to the inherent laxity of its juristic definition as " interference in the internal affairs of a state."

[1] *Annual Register*, 1838, p. 500 *et sqq.*; *British and Foreign State Papers*, 1837–1838, pp. 920, 930, 952, 953, 964, 974, 975, 978, 980, 983, 997, 1009, 1015.

[2] *Revue de Droit International*, 1873, p. 360 *et sqq.* *Annual Register*, 1838, p. 494 *et sqq.*

[3] Lavisse et Rambaud, Vol. XII. pp. 825–6.

But the link between internal and punitive intervention is to be marked not merely by the looseness of terminology of which they are the offspring, but also in the intention of the intervener, who generally regards the possible war, of which his act may be looked upon as the initiative, as undesirable or inexpedient.

It is quite possible for punitive intervention to be closely followed by internal intervention.

The measures adopted by England, France and Spain against Mexico, in 1861, clearly illustrate this point and vividly depict the difference between them.

The anxiety of Great Britain and Spain—an anxiety which France professed at least for a time to share—to restrict their demands from the very first to the satisfaction of their just claims and at the same time to refrain from internal intervention is evinced in Article II of the Convention of October 31, 1861, in which the

" High Contracting Parties engage not to seek for themselves, *in the execution of the aforesaid coercive measures*, any acquisition of territory, nor to exercise in the internal affairs of Mexico any influence of a nature to *attack the right of the Mexican nation to choose and freely constitute the form of its Government.*" [1]

The " coercive measures " referred to the punitive intervention, the " influence of a nature to attack," etc., to internal intervention. It was the former that Sir J. Crampton conjured up in his mind when he spoke of " the Powers whose joint intervention was recommended," [2] and it was the latter which Lord John Russell deprecated in stating his conviction that " of all countries, Mexico was the one where intervention in its internal affairs would bring the most severe disappointment upon its authors," [3] a gloomy prophecy which was fulfilled to the letter. The withdrawal of England and Spain from a position which they considered untenable when Napoleon III revealed ulterior designs upon the throne of Mexico by his opposition to the Juarist party connotes the point at which the intervention ceased to be punitive and legal and became internal and illegal.

The Greek Intervention of 1850 furnishes an example of the coexistence of punitive intervention on the part of Great Britain with an external intervention in the shape of the French Government's endeavours to act the part of peacemakers in the wrangle.

[1] *British and Foreign State Papers*, 1860–1.

[2] *Op. cit.*, 1861–2, p. 323.

[3] *Op. cit.*, p. 329.

We have already hinted our preference for " Pacific Intervention " to designate conduct of the latter kind. Incidentally, it is worth while to note as a proof of the embryonic condition of the word that " intervention " is used but sparsely in the State Papers of 1849–1850, " good offices," " mediation," " interposition," " negotiation " having the preponderance when need is found to express the idea contained in external intervention; just as " interference " prevails in official documents connected with the punitive interventions in Greece [1] and Mexico.[2]

§ 3. *External Intervention.*

External Intervention is the interference by one state in the relations of two or more states without the consent of both or either of them. This definition is taken from Hall's work.[3] It may be added that the great majority of external interventions have had as their object the promotion or settlement of an existing war. And even where the " relations " interfered with have been other than those of open hostility, they have hung upon the brink of it, as witness the case of Prussia in her conduct towards Austria when the latter extorted a large portion of the Palatinate and Bavaria from the Elector of Bavaria. Gericke devotes his ninth chapter to an examination of this " intervention of Frederick II," 1778.

The line between punitive and internal intervention on the one side separates them both from external intervention on the other. It is bridged by the circumstance of identical terminology in all three cases, based in its turn upon the common element of interference in the case of the two former and of meddling between disputants in the case of the two latter.

Some jurists who have noticed the existence of the distinction between internal and external intervention have scarcely grasped its importance. Thus Amari dismisses external intervention with the remark that " cette ingérence se réduit à une alliance de la nation qui intervient avec l'état dont elle épouse la cause et à une guerre contre l'autre " [4] and devotes the remainder of his sketch to internal intervention; while, curiously enough, Twiss limits his observation upon intervention to " interposition " (which corresponds to external intervention) and is silent upon

[1] *British and Foreign State Papers*, 1849–50. [2] *Ibid.*, 1860–1.
[3] *Op. cit.*, § 88. [4] *Revue de Droit International*, 1873, p. 352.

the subject of internal intervention.[1] It is submitted that the ideas represented by these two branches are entirely disparate.

International law governs the relations of independent *states*. So long as the state is an unit and inflicts no illegal injury upon other states, anything that may take place within it is not theoretically cognisable by any other state. In practice, no opportunity for disregarding independence has appeared more favourable to other states than a neighbour's political discords. But these internal interventions have dwindled sufficiently to assure us that they are only exceptional. It is still necessary to define them strictly and to forestall any who would employ the contrariety of past usage as a weapon for their enlargement. What is of immediate importance for our purpose is that these exceptions are numerically few and can be formulated without great difficulty.

Let us now turn to external intervention. As defined above, it must take the practical forms of actual or threatened war. What then is the peculiarity in a war with one of two belligerent (or at least disputant) states that justifies its isolation as a distinct species? How does belligerent external intervention differ from any other war?

We think that there is no solid difference. If war of this kind were not invariably preceded by abnormal circumstances, it could never have become conspicuous as external intervention.

A state may, with respect to its foreign relations, be in—

(*a*) A normal condition—peace;

(*b*) An abnormal condition—war. In this case, the normal condition of states other than the belligerents is neutrality, the abnormal, war or external intervention. But we are unable to discover in this abnormality any ground for differentiating in point of law belligerent external intervention from any other war. A fight remains a fight, whether the combatants number two or three.

It is true that Heffter considers that the utmost allowable to neutrals to prevent the derangement of political equilibrium is "la paix armée."[2] But, as he admits in the same breath, that armaments sufficient for the protection of individual or common interests may be raised, and, as each state must, in the absence of any impartial superior, decide for itself when its interests are prejudiced, it is not very intelligible why a hundred thousand

[1] *Law of Nations*, II. § 7. [2] § 45.

men put by a government on a war footing should stand idle in "la paix armée," when, in the opinion of their rulers, the country's welfare is being injured by a war between two other states. Surely "the *chassepots* would go off of themselves."

From the standpoint we have taken, the fundamental distinction between external and internal intervention can be seen; the enumeration of the causes of the former is not, while that of the latter is, within the sphere of international law. For, apart from declaring that "under certain circumstances a clear and sufficiently serious breach of law, or of the obligations contracted under it," [1] has taken place, it is impossible to catalogue exhaustively the just grounds of war. Frequently, wars are "caused by collision of naked interest or sentiment, in which there is no question of right, but which are so violent as to render settlement impossible until a struggle has taken place." [2] And, if it is possible for the belligerents to hold distinct opinions, it is open to other states to do likewise and to back their beliefs with the edge of the sword. This view is supported by Abdy, Twiss, Pufendorff and, in substance at least, by Bluntschli, and has the even more important recommendation of being that recognised in international practice. We own that this exclusion of the causes of war from the province of international law is the work of comparatively modern lawyers. But it cannot be said that their predecessors' treatment of the subject was ever of the least practical value.

In short, the conclusion seems inevitable that so far as belligerent external intervention is a breach of international law, it can and must be discussed as such. Beyond that, the system does not profess to make a list of the causes whereby it (or any other war) is justified.

It would be idle to find fault with what is now an accepted term; but upon the ground of precise phraseology, the twofold meaning of intervention—external and internal—is unfortunate. It has engendered the habit of confounding two entirely different branches of law,—that which regulates the choice of conduct open to states towards belligerents, and that which specifies the occasions upon which it is lawful to interfere in the disorders of another state.

It cannot be certainly stated that § 49 of Vattel's third book [3] was the birthplace of external intervention; but the word

[1] Hall, *op. cit.*, § 16. [2] *Ibid.* [3] *Supra*, p. 133.

appears in this sense in the treatises of jurists, the state papers and other official documents so much later than in the sense of internal intervention that it is hard to resist the inference that the former is an analogical extension of the latter. Foreign Offices have often annexed a different signification to it—that of an attempt to prevent or terminate war by pacific remonstrances, styled "good offices," "interposition," "mediation," "negotiation," "intervention."

So far as "intervention" represents substantive branches of international law, it is exhausted by the classification, "external," "internal," "punitive." But its signification has always been to a greater or less extent in solution, and it must necessarily display some fluidity until it crystallises into a clear-cut meaning. De Martens' employment of it to cover friendly interference by one state on behalf of one of its own *nationaux*, or even on behalf of a foreigner who has incurred some penalty under the law of another state, has already been noticed.[1] The federal execution decreed by the old German Diet has occasionally been described as intervention. Again, it has been applied to the results of an internal intervention. Thus the partition of Poland is constantly spoken of by modern (though not contemporary) jurists as an intervention.

M. Engelhardt extends the word, with a semi-apology, to include the exercise by one state of a comparatively trivial portion of the powers of internal autonomy abandoned to it by another, under a custom or a treaty; *e. g.* an agreement not to make a military occupation of a certain zone; the abnegation of jurisdiction over resident aliens; their religious protection; the concession to a neighbouring government of the administration of such internal services as customs, postal and telegraphic services.[2]

Considerations of space have made it impossible to say anything of the history of justifications for intervention.

[1] *Supra*, p. 135. [2] *Revue de Droit International*, Tome XII. pp. 365–6.

SUBMARINES AT THE WASHINGTON CONFERENCE

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At the Conference which met at Washington towards the close of the year 1921 limitation of naval armaments was in the forefront of the programme. The American Delegation at the outset put forward far-reaching plans, which Great Britain sought to extend still further by rejecting altogether submarine craft as a weapon of naval warfare. However, in the Naval Treaty [1] which was the outcome of the discussions, and was signed by the British Empire, the United States of America, France, Italy and Japan on February 6, 1922, although the contracting parties accepted a limitation upon the tonnage of their larger surface warships, they declined both the American and the British submarine proposals. Instead they preferred to adopt four resolutions dealing with submarine warfare, which were embodied in a treaty signed [2] on the same day. The first resolution (constituting Article 1 of the Treaty) gave formal shape to the customary rules of law which were long since evolved to regulate the attack and destruction of merchantmen, and declared that belligerent submarines were not under any circumstances exempt from these universal rules. The second (Article 2 of the Treaty) invited all other states to give their consent to this declaration of established law. In a third resolution, which is Article 4 of the Treaty, the five Naval Powers recognised that in practice submarines could not be employed in the destruction of commerce without breaking the law. They accordingly agreed as between themselves never to use submarines as commerce-destroyers, and asked other Powers to give expression to the same determination. The remaining resolution constitutes Article 3 of the Treaty and is concerned with methods of punishment; under it any person in the service of any Power who violates any of the rules declared in Article 1 is to be liable

[1] *Parl. Papers*, Misc. No. 1 (1922). [Cmd. 1627.] [2] *Ibid.*

to trial and punishment "as if for an act of piracy"; he may be brought before a tribunal, civil or military, of any Power within whose jurisdiction he happens to be, and it is to be no defence for him that he acted in obedience to superior orders. The ambitious object of this short paper is to set a value on these resolutions.

There is no need to linger over the question whether, even if specially barbarous methods of warfare, such as submarine warfare on merchantmen, or the use of poisonous gases prohibited in the next Article of the Treaty, are successfully prevented, war's aggregate toll of suffering is thus necessarily reduced, nor to speculate whether the wars of the future must inevitably add horror to horror until civilised man is no more. An anonymous writer has argued with great force in an earlier volume of this Year Book that—

"it is a complete misconception to imagine that any future war between Great Powers . . . can by any laws whatever be rendered 'less intolerable' than the late war. War is intolerable in proportion to the destruction of life and property it affects . . . and it is certain that if wars between individual states continue they will become not less destructive but more so. This is a necessary consequence of the application of science to warfare." [1]

But even if these gloomy forebodings are true, it is certain that men, in the intervals of peace which will come to them, will devise rules of war for long years before they learn wisdom to abolish war altogether. Moreover, so long as human sympathies react towards individual victims of singular brutality more quickly than towards a whole army of mere ordinary sufferers, the public opinion of the world will demand rules to prohibit ruthlessness in war whether or not the sum of misery is really brought lower by its efforts. Lawyers, therefore, no less than statesmen, should for practical purposes accept without challenge these characteristics of the public mind, in order that they may be able to guide by their studies aspirations which, right or wrong, they could not destroy.

Thus approached, the question for consideration is whether the Washington Submarine Treaty bids fair to achieve its immediate objective—the prevention of submarine warfare as waged by Germany in the late war. Before that war, submarines had not disturbed the serenity of conferences. But aircraft had done so. When the delegates met at the Hague in

[1] Vol. I. (1920–1921), p. 111.

1899, war in the air was no doubt still a concept of the imagination; experience had not taught hard-headed strategists its practical value. So it was comparatively easy for the conference to secure agreement by prohibiting the launching of projectiles from air vessels for a period of five years. But when the delegates met again in 1907 a change had come over the stronger military Powers. Their advisers understood the possibilities of aircraft in land warfare, and so the Declaration which renewed the ban on projectiles until the close of the then intended third conference was without the signatures of France, Germany and other important states. If submarines had been to-day still untried in war, Washington might have followed the easy precedent which the first Hague Conference created in its treatment of aircraft. It might have banished submarines from all navies for a term of years, and thus given the world a valuable if limited respite. The signatories would probably have kept faith; and means for detecting evasion might have been devised to assist them to do so. The result would then have been that the belligerents in minor wars would have begun and probably ended hostilities without the aid of submarines, whereas, if a general war had broken out, at any rate there would have been no swarms of submarines ready in the early days to descend upon the unsuspecting commerce of the world. But submarines have had their baptism of war, and the same motives which prevented agreement upon air-vessels at the Hague in 1907 have doubtless influenced the decisions of Washington this year. The submarine is therefore to stay, and it will be used in the next maritime war. That being so, a restatement of existing law in terms securing general assent, or, to use the words of Mr. Hughes,[1] "a clear pronouncement from the civilised world that never again should any nation dare to do what was done when women and children went to their death in the *Lusitania*," was most desirable, and this the first two Articles of the Washington Submarine Treaty are intended to secure.

But what of Article 4? If submarines, as this Article assumes, must by technical difficulties for ever be prevented from carrying out an attack upon commerce in accordance with the rules laid down by international law, it is self-evident that their use as commerce-destroyers is prohibited. Not much can be gained by formulating twice in one treaty a conclusion so irresistible.

[1] Reported in *The Times*, Feb. 2, 1922.

Yet, in spite of all this emphasis, unless some more effective means can be provided for giving effect to it than any at present known, in a general war (such as the last) submarines would probably be used for commerce-raiding and for every other purpose which seemed to offer momentary advantage. Thus the Article might well handicap the more scrupulous of the warring nations, while its disregard by the unscrupulous brought discredit upon the law. Each successive breach of the law invites another.

Moreover, Article 4 betrays a negative attitude where progressive thought is essential. Shortly after the close of the Conference Mr. John Leyland, whose right to be heard on naval strategy will not be questioned, addressed a latter to *The Times*,[1] in which he wrote :

" The point to which attention should be directed is the advance of the submarine. Captain Castex,[2] like all thinking people, recognises that the Germans were justified, in their extremity, in resorting to this instrument of war, and, were we in a like situation, we should undoubtedly do the same thing. But, with Captain Castex, we utterly renounce any resort to submarine barbarity, such as in too many instances sullied the German flag. The relative value of ships and vessels has changed . . . perhaps it was unreasonable to expect potential enemies to bind themselves permanently to the loss of a weapon which they may yet, in some dim and as yet undiscernible future, find it essential to use."

It is not necessary to endorse Mr. Leyland's argument—for myself I cannot do so; but it is necessary to take into account the large body of opinion which he represents, and to accept his reminder that " the point to which attention should be directed is the advance of the submarine." The fourth Article of the Washington Treaty, on the other hand, looks backward, and the delegates have taken upon themselves to set limits upon the inventive capacity of the future. They would deprive belligerents for all time of a weapon which might be of vital moment to them, while it is still conceivable that means may be found to adapt it to the standard demanded by humanity.

Yet the laws of war which are generally observed have not been brought into being by such a process as this.

" International Law as applied to war," wrote Hall, " consists in customary rules by which the maximum of violence which can be regarded as necessary at a given time is determined. These rules, though sufficiently ascertained at

[1] Feb. 11, 1922.

[2] Author of *Synthèse de la Guerre sousmarine de Pontchartrain à Tirpitz.*

any particular moment to afford a test of the conduct of a state, have been, and still are, changing gradually under the double influence of the growth of humane feeling and of the self-interest of belligerents." [1]

Self-interest of the belligerents—does this Washington Article take sufficient account of it? It has an ugly sound; yet it is on principle dangerous to the efficiency of the laws of war to lay down rules too strict or too precise when conditions change from war to war and the methods of securing compliance are sometimes so unreliable. It might, perhaps, have been better to have rested content with a re-statement of existing law, leaving it to research and to the inventive ingenuity of experts to discover if possible some means of conforming with it.

If it be objected that such a course would have been almost a confession of the bankruptcy of the law of nations, Oppenheim has supplied the answer when he writes that " the law of peace is the centre of gravity of international law." Lawyers must of course, as has already been urged in this paper, take a hand in shaping treaty-made rules for war, partly because their legal experience ought to assist public opinion, which demands such rules, to choose between the better and the worse, partly because the rules are by no means so valueless as the special circumstances of the last struggle made them appear to be. But it remains true that the *raison d'être* of the law of nations is to maintain such order in the world that wars, or at any rate many wars, may be prevented; and by this standard ought it to be judged.

The third Article of the Washington Submarine Treaty is concerned with the enforcement of the laws for the protection of the lives of neutrals and non-combatants at sea in time of war. It provides, not only that offences may be punished as war crimes, as undoubtedly they may be,[2] but also that offenders in the services may be punished for them whether or not they acted under superior orders, " as if for piracy." Now piracy is essentially a crime committed without the authority of any state.

" Private vessels only can commit piracy," wrote Oppenheim. " A man-of-war or other public ship, as long as she remains such, is never a pirate. If she commits unjustified acts of violence, redress must be asked from her flag state." [3]

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[1] *International Law*, § 17.
[2] Oppenheim, *International Law*, 3rd ed., Vol. II. p. 344.
[3] *Op. cit.*, Vol. I. p. 434.

And this consideration is not merely of technical importance. For since piracy is an "international crime," and a pirate is *hostis humani generis*, he is punishable in the courts of all nations; yet this world-wide jurisdiction over piracy cannot give rise to diplomatic complications just because piracy is a crime which cannot be committed by the authority of any state. Evidently the reference to piracy was introduced into the Washington Treaty to justify world-wide jurisdiction over submarine offences and the trial of the offender "before the civil or military authorities of any Power within the jurisdiction of which he may be found." But submarine offences, unlike piracy, are very liable to be committed by the authority of a state, and consequently this universal jurisdiction, if exercised, might well lead to serious disputes. In the last war, for example, could any European neutral have dared to punish as a pirate the commander of a submarine for whose conduct the German Government had accepted responsibility? Trials in neutral states would almost certainly be most rare in those very wars in which the sanction of law was least effective and the number of offences greatest.

A far more difficult question is whether "superior orders" ought to be a defence available to a war criminal on trial before an enemy court. Washington says "No." Oppenheim until the end of his life, and in spite of strong criticism, adhered to the opposite view. "Violations of rules regarding war," he wrote, "are war crimes only when committed without an order of the belligerent Government concerned," [1] and this standpoint was reflected in Article 443 of the *British Manual of Military Law* published just before the war with Germany, and in the *Rules of Land Warfare* approved by the United States General Staff, also in 1914.[2] The question whether such a defence was valid was acrimoniously debated during the war, and it has since come back into prominence on account of the acquittal of Lieutenant Neumann. By the Treaty of Versailles the Allied and Associated Powers had reserved the right to try before their own tribunals and punish persons guilty of transgressing the laws and customs of war (Art. 228). This provision, embodied in a part of the treaty bearing the title of "penalties," was regarded by many as laying the foundation of a new sanction for the laws of war. Subsequently the article was modified by consent to the

[1] *Op. cit.*, Vol. II. p. 342.

[2] See *American Journal of International Law*, Vol. XV. (1921), p. 441.

extent that preliminary trials of certain persons accused of war crimes were conducted by a German Court at Leipzig. Neumann was the commander of a German submarine, and at the trial, according to the reports,[1] he admitted that he had sunk by torpedo the British hospital ship *Dover Castle*. Yet he was acquitted by the German Court because he was able to establish that he had acted in accordance with instructions from the German Government. This verdict provoked much discussion in all countries, and provided Mr. G. A. Finch with an opportunity of reviewing in the *American Journal of International Law* the present state of authority upon the question.[2]

But for the purposes of this paper it is unnecessary to pursue the discussion further because, whichever view be accepted, the weight of the sanction of the laws of war can hardly be very materially affected. Mr. Finch surely overstates his case when he concludes his article by affirming that—

> " the unqualified acceptance of the principle that a subordinate is not responsible for what he does under orders of his superiors will make it practically impossible to enforce penalties for violations of the laws of war." [3]

Indeed, it is to be hoped that he does so. For such is the strength of national patriotism, so overwhelming the certainty that volunteers will come forward at whatever peril to themselves ready to obey their country right or wrong, that if the main sanction of the laws of war lay in punishing individuals who obeyed their sovereign's illegal commands on the rare occasions when they fell into the hands of the enemy, or were handed over under a peace treaty, or happened to be found on neutral territory, that sanction would be slight indeed. In fact, punishment of individuals is the most suitable method of dealing with that class of war crime, familiar in every war, for which the perpetrators are solely responsible and for which they should certainly pay the penalty themselves. But it could never be more than a subsidiary method of dealing with authorised war crimes, the punishment of which must in the main be sought through other channels.

It is improbable that a completely effective means of preventing or punishing authorised war crimes will ever be found. War is self-help, and self-help is a means of redress which, unless

[1] See *American Journal of International Law*, Vol. XV. (1921), p. 440.
[2] *Ibid.* [3] P. 445.

curtailed within the narrowest limits, is incompatible with the law. Itself a confession of the failure of the law, it generally brings with it the partial or complete overthrow of ordered society. The laws of war are a device of expediency, a makeshift to counteract as far as may be the consequences of the disorder resulting from the resort to self-help. It is surely inevitable that their success should be but partial.

In a war between a powerful state and a weak state the main security for the observance of the laws of war is that one party feels that the task is too easy to make it worth while to lose prestige in the neutral world by breaking them, while the other party fears that by lawlessness it may add the strength of a neutral to the already disproportionate strength of its enemy. This is a good security. Indeed, the stronger state not infrequently seizes the opportunity of winning neutral favour by concessions to neutral trade, thus consolidating its diplomatic position in the world, while the weaker state is intimidated into the surrender of some of its legal rights. On the other hand, if the parties to a war are evenly matched, and the neutrals are many and powerful, the sanction of the laws of war is still strong; it will be found mainly in the fear of each belligerent group that injured neutrals may take concerted action to secure redress. It is, however, in those rarer but far more devastating wars in which the belligerents are well matched and the neutrals are few that the sanction of the laws of war is comparatively ineffective. In such wars, when the struggle draws out its weary length towards a desperate final effort, the possible advantages of utter lawlessness may be irresistibly alluring. No doubt at such a crisis the intervention of a single neutral might turn the scale, as it did in the world war. But belligerents are apt to miscalculate, thinking that the remnant of the neutral world will value too highly the blessings of that peace which they long to regain, and they dare them to intervene. Such was the challenge which Germany flung to the United States; her miscalculation and its cost are known. Here, perhaps, it is not too fanciful to discern the working of the sanction to which Mr. Root referred when he said at the Washington Conference that there was " a force greater than Governments or than navies, the force of the public opinion of the civilised world which could mete out terrible punishment." [1] Here is certainly to be found the answer to those who argue with Mr.

[1] Reported in *The Times*, Feb. 2, 1922.

Leyland that Germany was justified in resorting to submarine warfare, and a warning to them if they should ever urge the British Empire to follow in her footsteps.

Such, then, is the sanction of the laws of war—strong in the lesser wars, possibly decisive in those world conflicts in which it seems so weak, but not strong enough to prevent all lawlessness in any war, least of all in world wars where its working is uncertain and in any case not immediately apparent. To such strength as it has probably little can be added except through that imponderable factor, "the force of public opinion." If this conclusion be true, the main value of the Washington Submarine Treaty seems to lie, not in its clauses, but in its implications. Its main value does not lie in the first two Articles, though they do good service in attempting to secure a generally accepted re-statement of established law, nor in the third and fourth which are of doubtful value or expediency. Its value, and the value of the resolution to examine and report on the laws of war which preceded it by two days,[1] lie rather in the testimony which statesmen who lived through a war of destruction without precedent have borne to the need of law in international affairs.

[1] *Parl. Papers*, Misc. No. 1 (1922), p. 23. [Cmd. 1627.]

IMMUNITY OF STATES IN MARITIME LAW

By W. R. BISSCHOP, LL.D.

Mr. Arnold D. McNair's article on "Immunity of Public Ships" in last year's Year Book deals with a subject which has become one of great actuality. At the instance of the Chamber of Shipping of the United Kingdom the subject of "Immunity of Sovereign States as regards Maritime Property" is placed on the agenda for the Conference of the Comité Maritime International which will be held in London on the 9th, 10th and 11th October, 1922, when an attempt will be made to find a solution of the difficulties encountered in the recognition of immunity of state-owned vessels.

Mr. McNair formulates the following rules, as far as English Courts are concerned,[1] viz. :—

"An English Court will not exercise jurisdiction over the public property of a foreign State recognised by the British Government as a sovereign State, including ships which are claimed by that State to be its public property, whether actually engaged in the public service or not; such a claim is conclusive and unexaminable by an English Court; this immunity of public ships extends to proceedings *in rem* as well as proceedings *in personam*, and of course to arrest.

"Ships which are not the property of a foreign sovereign State, but are chartered or requisitioned by it, or otherwise in its occupation, may not be arrested by process of the Admiralty Court while subject to such charter party, requisition, or other means of occupation; but proceedings *in personam* against the owner of the ship, and (apart from arrest) proceedings *in rem* are unaffected and a maritime lien or a judgment *in rem* may be enforced as soon as the occupation of the foreign State comes to an end."

That these rules are far from satisfactory appears from the words used by Hill J. in the *Esposende* [2] and again in the *Crimdon*,[3] a Swedish ship operated by the U.S.A. Emergency Fleet Corporation.

[1] *British Year Book of International Law*, Vol. II. (1921–22), p. 74 (*d*) and (*e*).
[2] Lloyd's List Newspaper, Feb. 19 and 27, 1918.
[3] (1918), 35 T.L.R., 81.

"It is a great hardship upon the persons who have claims against such privately owned vessels that they should lose their most substantial remedy (arrest), and in the interest of safe navigation it is most unfortunate that there should be a number of vessels navigating the seas whose owners know that however negligently they may be navigated no maritime lien can be enforced on the vessel while it is in State employment."

In a closely argued memorandum issued by the Comité Maritime International, the same judge, after referring to the views expressed by Sir Robert Phillimore in the *Charkieh* [1] and to the provisions of Article 281 of the Treaty of Versailles,[2] which is similar to Article 233 of the Treaty with Austria, arrives at the following conclusion :—

"If sovereign States engage in trade and own trading ships of their own or use trading ships of private owners, they should submit to the ordinary jurisdiction of their own and foreign Courts and permit these Courts to exercise that jurisdiction by the ordinary methods of writ and arrest. It is also matter for consideration whether the like should not apply to State-owned ships not engaged in trade. If arrest of ships of war cannot be permitted there seems no good reason why proceedings *in rem* should not be allowed, or why some machinery should not be provided whereby an undertaking to pay should take the place of arrest and bail."

The difficulties to which Hill J. refers are greatly emphasised by the views held by the British Courts of the sovereignty of the British Crown. In many countries other than the United Kingdom, immunity of the State is not recognised in the national courts. States may be sued as ordinary litigants. It was truly observed by the defendant in the proceedings before a German court in the case of the *Sea King*,[3] a vessel engaged in mercantile pursuit but owned by the United States Shipping Board, and against which a claim *in rem* had been brought for damage caused by collision, that—

"international law did not give the German Court the right to institute proceedings against property held by the American Government as such proceedings must take place before an American Court." [4]

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[1] (1873), L.R. 4, A. and E. at p. 90.

[2] "If the German Government engages in international trade, it shall not in respect thereof have or be deemed to have any rights, privileges, or immunity of sovereignty."

[3] Referred to in Lloyd's List of Feb. 4, 1922, under the heading *Shipping Litigation—International Court urged.*

[4] Cf. U.S.A. Act of March 9, 1920, No. 156, authorising suits against the United States in Admiralty. As to the Commonwealth of Australia, by sect. 56 of the Judiciary Act 1903 (No. 6)—1920, it is provided that any persons making a claim against the Commonwealth, whether in contract or in tort, may bring a suit in the High Court or the Supreme Court of the State in which the claim arose.

In English constitutional law the Crown is still the executive power, though reduced in compass and limited in exercise. By exercising the jurisdiction through judges who are the councillors and representatives of the Crown, the Crown cannot be impleaded in the courts whether in the person of the Sovereign or in that of property belonging to the Crown or in any other form. It is part of the King's prerogative, emanating from his position as the feudal chief of the country, as the ultimate landowner and the lord of every man, and explanatory of the Crown's attribute of perfection of judgment: "the King can do no wrong."

Through the comity of nations similar immunity is extended in British courts to foreign Sovereigns and States.[1] The immunity from jurisdiction of a foreign Sovereign or head of a foreign State is founded on the dignity attached to his person and his position. He is considered similar in character to the bearer of the British Crown, though his position in his own country may vary greatly and intrinsically. The immunity does not attach when he assumes the character of a private individual for certain purposes.[2]

With regard to foreign States we find ourselves on entirely different ground. The conception "State" is not one of English constitutional history. It is of foreign origin. In countries other than Great Britain the "State" figures largely as the personification of the community of people gathered together in one political nation. The State is a corporation, a symbol bearing the sovereignty which in reality belongs to the nation. As a corporation it is subservient to the nation which forms its integral part, and can be impleaded and is impleaded in the national courts. The Sovereign, be it king or any other head of the State, is its inviolable head, but only inviolable in his action as such, in acts of State and of Government and not as a private individual. In his private capacity the head of the State can be impleaded and is impleaded in the national courts. When, therefore, English courts declare themselves incompetent to hear suits brought against a foreign State, that State may be sued by the unsuccessful claimant in its own national courts,

[1] Westlake, *Private International Law*, 5th ed. p. 27. "Foreign States and those persons in them who are called Sovereigns, whether their title be Emperor, King, Grand Duke, or any other, and whether their power in their State be absolute or limited, cannot be sued in England on their obligations *ex contractu*, *quasi ex contractu*, or *ex delicto*."

[2] Hall, *International Law*, 7th ed., 1917, pp. 180–1.

in contract or in tort. *Vice versâ* an action against the British Crown would not lie.[1]

The personification in English law which comes nearest to the conception "State" as the bearer and the outward appearance of "sovereign power," viz. the Crown, cannot be impleaded in its own courts, least of all in a foreign court. In English law the immunity of the Sovereign is absolute with regard to himself and everything that forms part of his prerogative.[2] In other constitutions this is not so.

The comity of nations does not admit the submission of one State to the jurisdiction of another State.[3] The fact, however, that a State is subject to the jurisdiction of its national courts and yet immune from being impleaded in courts other than its own, necessarily renders such immunity subject to qualification. In the first place it is similar in character to the inability in one State to execute a judgment given by the courts in another State. States respect each other's sovereignty and thereby secure each other's immunity from outside judicial interference.

If, however, a higher tribunal could be found than the tribunal of a neighbouring State, such higher tribunal might exercise jurisdiction without offending the sovereignty of the State subjected to it. The equality of a State's authority, and the absence of a higher power or a superior tribunal to which all States and their official organs could and would submit, prevent one State and its judicial organs from exercising authority over another State and its official organs and leaves the reference of questions affecting sovereign powers to diplomatic channels for solution.

The second qualification is that such immunity rests on convenience and the comity of nations only, and that its extension and limitation are subject to international agreement. The immunity granted to one sovereign State derogates from the sovereignty of the State which grants such immunity.[4] Such

[1] *The Parlement Belge* (1880), 5 P.D., 197, at p. 214.

[2] *The Porto Alexandre* L. R. [1920] P. 30.

[3] Except in the case of immovable property which is situate within the borders of another State and which by its nature is subject to the jurisdiction of the State of which it forms an integral part.

[4] *American Journal of International Law*, Jan. 1919, p. 20. "To the objection that the taking of jurisdiction by the Courts in cases of this character is derogatory to the sovereignty of the Government to which the property belongs, it seems a sufficient answer that it is equally and indeed considerably more derogatory to the sovereignty of the country in which the property is found to be shorn of vital attributes of sovereignty, exercised through administrative and judicial authorities, in order that such immunity may be granted."

derogation of sovereignty is justified by the respect shown to the sovereignty of the other State, that is to say, in favour of acts of sovereignty done by the other State. As soon, however, as the other State demands immunity which is not necessary for the due fulfilment of the duties of a sovereign State, the sacrifice is no longer balanced by a necessity, and the observance of such immunity becomes an anomaly. The private personality of a diplomatic agent and the private acts of a State in its capacity as corporation need not be exempt from the jurisdiction of a foreign court, and there are countries where this difference in character of the acts done is taken into account.[1] If a State, as a corporation, has acted in a private capacity, *e. g.* as merchant or trader, the courts of the other State seem justified in accepting the liability of the foreign State to be impleaded in their courts and subjected to their jurisdiction.

In England such contention has been rejected. "It has been frequently stated that an independent sovereign cannot be personally sued, although he has carried on a private trading adventure." [2] This may be right in English law. It is not a correct vision of the conception of sovereignty of a State in other than English law.

It has been accepted in certain countries that a foreign State cannot be subjected to the jurisdiction of another State for acts done within the latter's jurisdiction if they are done in the exercise of its sovereign powers, whether such acts were justifiable or not, or whether such acts should be considered to constitute acts of war or not.

In Belgium and Italy, whenever a State is acting in a private capacity, that is to say, whenever a State does acts which are of a private nature and cannot be considered as acts done in the exercise of its sovereign power, the courts in these countries are considered to have jurisdiction, and, although public property of such States—like ambassadors' dwellings, and warships—remain immune from arrest, the courts are considered to have

[1] Hall, *op. cit.*, p. 187. "The accepted practice is an arbitrary one, conceding immunities which are not necessary to the due fulfilment of the duties of a diplomatic agent; and in a few countries it is either not fully complied with, or there may, at least, be some little doubt whether it would certainly be followed in all cases or not. The views expressed by so competent an authority as Bluntschli suggests that Courts, at least in Germany, might take cognisance of a considerable number of cases affecting a diplomatic agent by looking upon his private personality as separable from his diplomatic character." Bluntschli, *Le Droit International Codifié*, §§ 139–140 and 218 *sqq.*

[2] *The Parlement Belge* (1880), 5 P.D. on p. 220.

jurisdiction and to be entitled to pronounce judgment against the foreign State. Whether the courts have jurisdiction is decided by themselves.[1]

The third qualification is that this is a matter of procedure only. The claim against the State need not be brought by an action *in rem* against the State's property, but can be brought as an action *in personam* against the State in its national courts. On the other hand, a maritime lien attaches to the ship and may be enforced when the vessel changes into private hands.[2] The difficulty in continental countries is not that of suing a State, that is to say, of the issuing of the writ, but that of the execution of the judgment. One cannot issue execution against State property. In such cases it is necessary that the State proceeded against should give bail or undertake to pay in case it should lose.

. . . . . .

It is highly desirable, in the interest of the democratic development of international law, that the doctrine recognised in English law should be abandoned and the continental rule modified to such an extent that immunity from jurisdiction should cease, if not altogether, in any event as far as maritime law is concerned.

Why should a claim against a State for damages for tort committed by its agents, or for remuneration for salving its property, be excluded from the jurisdiction of such courts as, in the ordinary course of civil procedure, would be entitled to hear the claim if brought against a private individual? As a rule these matters do not involve acts of State, and safeguards against seizure and arrest in order to preserve freedom of navigation, could easily be given.

With regard to vessels of war and state-owned vessels, these are in their navigation liable to all accidents and circumstances

[1] A comparison of the decisions of British and continental law may be found in the *Journal of Comparative Legislation and International Law*, Oct. 1920, p. 252, "State immunity in the laws of England, France, Italy and Belgium," by Prof. F. P. Walton, LL.D.

For American law see *American Journal of International Law*, Jan. 1919, p. 12: "The lack of uniformity in the law and practice of states with regard to merchant vessels," by Fred. H. Nielsen.

In Holland the courts have given varying decisions. By an Act passed in 1917 it has been provided that "The jurisdiction of the Courts and the executability of judicial decisions and of authentic Acts shall be restricted by the exceptions recognised by the Law of Nations." The vagueness of this provision is of little assistance. It does not settle any of the points at issue and leaves the Courts free to act as they think best.

[2] *The Tervaete* (1922), 38 T.L.R., 460.

of the sea. They are navigated by persons who are in the same position as the thousands of other persons who navigate private-owned vessels. Immunity of the vessel means freedom from liability for those who are responsible for navigating her, and for conduct which, if commercial vessels were concerned, would render them liable for negligence and tort. Such liability is imposed on navigation in the interest of safety at sea. Immunity of the ship involves the elimination of a safeguard for the purpose of the proper exercise of their duty by persons in the public service. In cases of salvage, the salving of public property of great value is as much in the public interest as the salving of commercial ships.

With regard to *requisitioned vessels*, the persons in charge of the navigation of the ship may remain the servants of the owners and be paid by the owners. Should it be argued that immunity granted to diplomatic envoys of a sovereign, to its vessels of war, and under certain circumstances to other property in its possession and control, could safely be afforded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question, and the dignity and honour of the sovereign in whose service they are, make abuse of such immunity rare, then it should be observed that there is no such guarantee for the conduct of the thousands of persons privately employed upon ships which at the same time happen through contract or requisition to be in the service of sovereign governments.[1]

What ought to be the remedy? In what direction ought the solution of these difficulties to be looked for? As the doctrine of immunity rests upon international agreement, it can be changed by the same method. Some thirty years ago an attempt was made to that effect by the *Institut de Droit International.* The *Institut* at its meeting at Hamburg in 1891 adopted a number of resolutions based upon the distinction of the State as an administrator or a trader and the State acting in its sovereign capacity.[2] According to those resolutions an international convention should admit compulsory submission of a State to foreign jurisdiction in certain cases, such cases to be carefully set out and internationally agreed to.

[1] *The Attualita,* 238 Fed. Rep. 909. Cf. *American Journal of International Law,* Jan. 1919, p. 16.

[2] *Annuaire de l'Institut de Droit International,* 1889–92, p. 436.

Is there no other method of arriving at a more satisfactory solution? The enumeration of cases when immunity shall or shall not apply, remains arbitrary and can never be complete or permanent. It cannot take cognisance of the gradual changes in international relationship as such relations advance and develop. The matter is mainly a question of jurisdiction. Cannot the aid be invoked of the Permanent Court of International Justice at the Hague, as the superior jurisdiction to which all sovereign States have agreed to submit? That Court is competent to decide upon all questions of international law, which undoubtedly includes questions of jurisdiction. If by international convention it was agreed between the different sovereign States that in disputes regarding territorial jurisdiction the Hague Court would have the ultimate and final decision no further detailed enumeration would be necessary of the cases in which foreign jurisdiction would apply. Appeals to the Hague Tribunal would for the present have to be made by the State whose jurisdiction has been curtailed by the immunity granted to another State, or by the State whose immunity has not been recognised, and the Hague Court would sit as a final Court of Justice. Gradually case law would settle the extent of jurisdiction to be exercised by a national court and there would be no fear of delay or of denial of justice, detrimental to the safety of navigation at sea.

The Hague Court would either (1) decide the competency of the national court in whose jurisdiction the dispute arose, or (2) refer the decision of the case to some other more convenient national court of justice, or (3) decide the case itself. The third course would very rarely be adopted, as it would involve decision of municipal maritime law, which is outside the scope of the Hague Court. The international character of the Permanent Court at the Hague would almost be a guarantee that the municipal law of each country would not be interfered with and that jurisdiction of municipal courts would be fully maintained and recognised, even though the limitation on their jurisdiction might be removed.

THE BARCELONA CONFERENCE ON COMMUNICATIONS AND TRANSIT AND THE DANUBE STATUTE

By G. E. TOULMIN,
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The Peace Conference of 1919 in the midst of its other preoccupations found time to deal with some at least of the problems inherent in the creation of a new order of international society. In addition to creating the League of Nations, it endeavoured to apply general principles to the treatment of international transport and communications. First, a general article with regard to communications was inserted in the Covenant of the League; and secondly, particular articles in the sections of the treaties of peace dealing with ports, waterways and railways set out to regulate the navigation of certain European rivers, and provided for international administration upon them, or enforced on the defeated states certain rules with regard to equality of treatment of traffic on their railways.

The article in the Covenant runs as follows :—

> Art. 23. " Subject to and in accordance with the provisions of international conventions existing or hereafter agreed upon the Members of the League . . . (*e*) will make provision to secure and maintain freedom of communications and transit. . . . In this connection the special necessities of the regions devastated during the War 1914–1918 shall be borne in mind."

The League of Nations lost little time in providing its Members with an opportunity to carry out this pledge, for it summoned a general conference on communications and transit to meet at Barcelona on March 10, 1921, while commissions representing the states interested had been set up meantime under the authority of the Conference of Ambassadors, to draw up instruments governing navigation on the rivers mentioned. The present note will review shortly the work of the Barcelona Conference and of the International Commission which drafted a Statute for the Danube. It should here be mentioned that the

defeated Powers concerned in each case took part in these deliberations in an advisory capacity only, and that their adherence to the instruments drawn up, whether general or particular, was obligatory under the Treaties.

It may be convenient to deal with the Danube Statute first, as its interest is more limited than that of the general statutes prepared at Barcelona. The commission summoned to draft a statute for this river consisted of representatives of the Danube riparian states and of France, Italy and Great Britain, and met in Paris from time to time during 1920 and 1921, the last meeting, at which the Statute was signed by all parties to the discussions, being in July, 1921. As will be seen later, the Barcelona Waterways Statute contemplates the establishment, by virtue of separate agreements between the states mainly concerned in each case, of special codes and governing bodies for the chief international rivers. It is already supplemented by such agreements covering navigation on the chief international rivers in Europe; of these the Danube is the most important, and presented the greatest difficulties.

The problems special to the Danube arose out of the large number of states concerned as riparians and the variety of their interests, the presence at the Iron Gates of a serious obstacle to navigation, which can only be overcome by elaborate and costly works, and the jealousy of the recently aggrandised Balkan States which command the lower reaches of the river. The mouth of the Danube had, indeed, been under international control since 1855, when the European Commission of the Danube was appointed. It was intended that this body should be temporary, and provision was made for its powers to be transferred to a riparian commission; but the Congress of Berlin in 1878 found the International Commission still in existence, and it was then confirmed in its powers and given an extended lease of life. The European Commission is an executive and administrative body which is directly responsible for works, harbours, pilotage and the marking of the channel from the Black Sea up to Braila. The Danube Statute confirmed these powers, but laid down that the European Commission should consist of representatives of Great Britain, France, Italy and Roumania, with power to add to their number in certain circumstances.

The Danube above Braila so far as Ulm, together with portions of certain tributaries, was declared " international " by

the Treaty of Versailles (Article 331) and by corresponding articles in the Treaties of St. Germain, Neuilly and Trianon, and for this purpose it was necessary to create a fresh international authority. This body, the " International Commission of the Danube," was provisionally set up by the Treaties; by the Danube Statute it becomes a permanent institution. It consists of two representatives of Germany, and one of each of the other riparian states and of such non-riparian states as are at any time represented on the European Commission.

The Statute further lays down the duties of the Commission and of the riparian states. All flags shall receive equal treatment as regards navigation on the Danube and the use of ports, except that the riparians retain in a limited form the right of reserving " petit cabotage " for their own subjects, the provision under this heading being more liberal than the general provision in the Waterways Statute. Customs must not be so levied nor dues so collected as to limit freedom of navigation, while the International Commission is given general powers of supervision and particular duties in connection with the framing of police and navigation regulations, the control of the Iron Gates and the execution of works. The functions of the Commission are mainly administrative, the execution of its decisions being left to the riparian states territorially concerned, but in certain circumstances it can order works and assume direct responsibility for their execution. Provision is also made for the settlement of disputes between the Commission and separate riparian states, ultimate recourse to the Permanent Court of International Justice being provided for in certain cases. This provision is somewhat involved as the Permanent Court can only try disputes between states, and could not hear the Commission as such.

The object of the Barcelona Conference was to deal with transit and waterways throughout the world; it was accordingly attended by representatives and experts from as many as forty-four states, including Austria and Bulgaria as members of the League and Germany and Hungary in an advisory capacity. Only the United States and Argentina among sovereign states of considerable importance were unrepresented.

The ideal which the Conference had to convert into statute law if possible was that the " right of way " for passengers and goods across or within all countries should be guaranteed without

discrimination based on nationality. This has never been realised in Europe since the break-up of the Roman Empire and the birth of the modern system of nation-states. In the Middle Ages the feudal lord assumed the right to levy tolls on goods passing over his domain, and when the rights of private proprietors were limited the state stepped in and levied dues. The practice of levying direct dues practically disappeared during the nineteenth century, but the indefeasible right of coming and going on lawful purposes without let or hindrance remained unrecognised. States adhered to the view that facilities for transit and communications within their territories were privileges which they could withhold or grant according to the dictates of their private policy. The considerations which moved them were not regard for the general commercial interests of mankind, but national fears and jealousy, or the desire to use their highways as assets in bargaining on general political questions or for the granting of preferences which gave protection to native enterprises.

After the war there was no sign of any spontaneous appreciation of the shortsightedness of this policy, and, indeed the revival of nationalism threatened to extend it. Consequently economic barriers between states increased, and international commerce, which ought to flow freely in the interests of all, was at the mercy of political rivalries and reprisals. This is specially the case where frontiers based on the principle of nationality cut across natural economic spheres, or where states with little or no seaboard are dependent on their neighbours for security of transport for their imports or exports.

For this state of things general international agreements are the only remedy, as most states will refuse on their own account to give up a weapon which other states may continue to use. Only in this way can transit and communications be lifted out of the common pool of diplomatic questions, and governed as a distinct and separate aspect of international relations by an agreed code enshrining the best usage which states will accept.

The work of the Barcelona Conference was accordingly one of codification. It was not the function of the Conference to lay down principles in advance of modern usage, and the only pressure which it could bring to bear on states jealous of their sovereign rights was that of public opinion; nor was it, like the Brussels Economic Conference, a conference of an educative and advisory nature, which ventilated wide questions with a view to

crystallising public opinion. It had to make laws, and its power for good was limited, like that of all legislative bodies, by what its constituents would accept and obey. Therefore the agenda of the Barcelona Conference was a carefully prepared instalment of " possible good," put forward on its own merits and as a step towards the at present unattainable " better."

The methods followed in preparing the agenda are worth study. The idea of general conventions to regulate transit and communication was first conceived in the Ports, Waterways and Railways Commission of the Peace Conference, whose members, reinforced by neutral representatives, became the Provisional Communications and Transit Committee of the League of Nations. As a result of nearly a year's labour, this Committee prepared for circulation with the invitations to Barcelona a comprehensive volume setting out draft conventions and recommendations with a full explanatory memorandum. Without this preparatory work the Conference could not have dealt with its formidable programme, because it would have been overwhelmed by the details which were cleared out of the way during the preliminary discussions, and also because it was only by such means that an atmosphere free from suspicion and fear of surprise could be created.

The agenda consisted of six items : (1) a scheme for a permanent Technical Organisation under the League of Nations to deal with communications and transit, (2) a draft Convention on Freedom of Transit, (3) a draft Convention on International Waterways, (4) a draft Convention recognising the right of landlocked states to their own maritime flag, (5) a draft Convention on International Railway Traffic, and (6) a draft Recommendation embodying regulations for the commercial use of internationalised ports.

The first of these was adopted by the Conference with only minor amendments in the form of Rules for the Organisation of General Conferences and of the Advisory and Technical Committee of the League of Nations on Communications and Transit. From its nature it did not require ratification, and having been accepted by the Council and Assembly it is now operative. It lays down procedure for the summoning of future conferences to deal with kindred questions, and also institutes a committee with a permanent secretariat at Geneva, whose functions are both to make proposals for future conventions and to inquire into any questions

in dispute between Members of the League with regard to the application of the conventions and of certain transport provisions of the Treaties of Peace. It is thus both a " drafting body " for future transport legislation and an organ of conciliation for disputes on transport questions. The importance of this latter function will be discussed later. The committee consists of sixteen members, appointed as to part by the states permanently represented on the Council and as to the remainder by the states selected from the remaining Members of the League.

The next two items on the agenda, the draft Conventions on Freedom of Transit and on International Waterways, call for closer examination, but a word must first of all be said about their form. Their text finally consisted of two parts, namely, a " Convention " and a " Statute." The whole instrument is still called a " Convention," but this title refers particularly to the first part of each document, which contains the diplomatic forms and sanctions essential in an agreement between sovereign states, who are bound only by specific signature and ratification on their part. In effect the " Convention " merely records the fact of agreement, while the " Statute " contains the subject-matter of the agreement unencumbered by repetitions, and will become the text in general use.

The Convention on Transit was adopted as presented to the Conference with small amendments. It applies to traffic in transit only; this term covers persons or goods transported across the territory of a state, of which the points of departure and the destination lie outside that state. Further this traffic must be in transit by rail or waterways; traffic by air or road is not affected by this Convention. Again the Statute will have only limited force in time of war, and will only apply between states which ratify it, while departure from its provisions may be permitted in national emergencies " for so short a time as possible." Another article provides that states are not bound by it to permit transit in the case of goods, if their admission is forbidden on grounds of public health or security or as a precaution against diseases of animals or plants or is regulated under other general conventions (such as the Opium or Arms Conventions), or in the case of passengers, if their entry is prohibited on any grounds. International treaties, conventions and agreements inconsistent with the Convention, which were concluded before May 1, 1921, are not abrogated, but the parties

bind themselves when occasion arises to bring them into harmony with the Statute so far as possible. The Statute does not apply as between separate parts of the same sovereign state, even where, as in the case of the British Empire, these parts are separate members of the League of Nations, nor is it obligatory in the case of small " enclaves " such as Pondicherry.

It will be seen that the main principle laid down in the Statute is limited. It covers only " traffic in transit," and does not affect in any way the rights of contracting states as regards traffic originating in or destined for their territory. The assertion of a broader right for commerce would have been advisable, but the preliminary investigations disclosed, and the discussions at Barcelona bore out, that states remained so jealous of their sovereignty that they would not brook interference with their right to regulate according to their own devices traffic with places in their own territory. This was and remains their own business, and if they choose to close their frontiers either for entry or exit of goods and passengers, they are the party most directly affected. In the case of transit traffic, however, the " transitee " state has the smallest interest of the parties concerned.

In the first two articles of the Statute the principle is laid down that transit traffic shall be facilitated. The exceptions and limitations which are summarised above are then enumerated. They are sufficiently numerous to give some ground for the comment that the Statute laid down a principle in Article 1 and then devoted twelve articles to saying when the principle need not apply. Whether this is a complete statement of the case, however, can only be said after examination of the scope and nature of the limitations. Some of them explain themselves. If transit traffic is to be given freedom of passage, it must travel by routes upon which it can be easily distinguished and controlled; hence the provision that only traffic by rail or waterway is covered. It is equally clear that states which have contracted to control strictly traffic in opium or arms, or which consider it necessary to exclude from their territories persons with subversive opinions, will not bind themselves to give free transit to such goods or persons.

Again, the principle that the Statute applies only between the contracting states is sound, because otherwise states holding themselves aloof would receive the benefits of the statute, but would be free to hinder the traffic of states bound by its provisions.

The acceptance of this principle was inevitable and it drew in its train the provision that anterior agreements between states need not at once be denounced if they were contrary to the Statute, as certain such conventions exist between states likely to ratify and states not represented at Barcelona. Time had to be given for adjustment of existing contracts between states to the new level set by the Statute.

The position of the Statute in time of war raises a more difficult question. A strong body at Barcelona, led by Switzerland which had lively memories of its recent difficulties as a neutral island in an ocean of war, urged that the Statute should have equal force in war as in peace. This would, however, have been impossible without a complete revision of the rules of contraband and blockade, a most acutely controversial task, nor would it have been tolerated by states which had during the war been forced to the widest interpretation of their belligerent rights. The only solution which could save the Statute was that embodied in Article 8, which reads as follows :—

> Art. 8. " This Statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The Statute shall, however, continue in force in time of war so far as such rights and duties permit."

This article imposes on states placing hindrances on transit traffic in time of war the onus of justifying their action by appeal to a recognised principle of the laws of war, and gives to states which suffer by limitations on transit traffic in time of war a right to call for an explanation. If a more definite provision had been inserted, the Statute would not have been passed.

The moral to be drawn from these qualifications of the principle of freedom of transit is that a great gulf lies between the enunciation of generous principles and their statement in black and white as statute law which meets the practical difficulties of international society in its present form. In no region is it more true that " le mieux est l'ennemi du bien." The rigid modern conception of state sovereignty, which is inconsistent with the creation of an effective international legislature and judiciary, cannot be swept away all at once.

It is from this point of view that Article 13, which we must now consider, is perhaps the most important article in the Statute on Freedom of Transit, after Articles 1 and 2. It provides that any dispute concerning the interpretation of the

Statute must be referred to the Permanent Court of International Justice, unless other effective means of settlement exist. In order, however, that such disputes may so far as possible be discussed in a friendly way, the contracting states undertake to submit such disputes for a preliminary opinion to the Advisory and Technical Committee, set up as already indicated. The article ends :—

> " In urgent cases a preliminary opinion may recommend temporary measures intended in particular to restore the facilities for freedom of transit which existed before the act or occurrence which gave rise to the dispute."

It will be seen that this article goes a good deal further than the ordinary " Arbitration Clause." The recognition of the standing of the Permanent Court is definite and provision is made elsewhere for the appointment of assessors to aid the court in technical matters. But more interesting is the step taken towards the creation of an international Court of First Instance with power to issue " Interim Injunctions " in emergencies. In this the Conference initiated an experiment of far-reaching mportance, in which may be found the germ of an international judiciary with powers corresponding to those of municipal courts.

The object of the other convention adopted at Barcelona was the elaboration of rules for the application of the principle of freedom of navigation to waterways of international concern. This task had been attempted more than once in the past. In 1792 the French Republic proclaimed complete freedom of navigation and equality of flags on such waterways, while the Congress of Vienna drew up rules which, though of a general character, kept alive the idea of a liberal policy and governed the rights of navigation during the nineteenth century on rivers such as the Rhine, Danube, Niger and Congo. The need for international regulation of such traffic is obvious. A state traversed by such a waterway could not reserve its use for its own subjects without grave injury to other riparian states, particularly those up-stream which would thereby lose a valuable outlet to the sea. But for a number of reasons the attempt to elaborate with greater precision the principles governing the use of such rivers proved to be of extraordinary difficulty, and more than once it appeared about to break down. The actual definition of international waterways was the subject of almost endless discussion. For practical purposes they may be defined as " waterways

accessible to ordinary commercial navigation which provide more than one state with access to the sea"; the definition in the Statute is, however, complicated and technical, and for reasons which it is not possible to discuss here the Conference abandoned the simple term "international waterways" and substituted for it "waterways of international concern."

The framing of regulations to apply to the waterways thus defined proved not less fruitful of contentious issues. The Waterways Convention applied to a definite class of rivers, of which the Danube, the Congo and the Parana are examples in three continents. There was accordingly a direct conflict of interest between states, such as Roumania, which occupy a strong strategical position on such rivers, and those, such as the Scandinavian Powers, which are not riparian to any international waterway, but would receive or be confirmed in wide rights under the Statute. Again the provisions regarding the upkeep of the navigable channel threatened to impose on riparian states an obligation to incur considerable expense from which they themselves might derive no advantage, though states up-stream benefited greatly. It was necessary, therefore, to work out a formula under which such states could demand contributions from other riparians towards the upkeep or construction of works, or other riparians even demand the right to undertake such works at their own expense. Again the right of states to draw water from such rivers for irrigation or power-stations had to be safeguarded, while certain states clung tenaciously to their right of reserving to their own subjects "petit cabotage," *i. e.* the transport of passengers and goods loaded at one port within its territory for another port also within its territory. For all these problems solutions had to be found which effectively asserted the right of navigation without too obviously imposing servitudes on the riparian states.

There is little cause for surprise, therefore, in the fact that it took a long time to put the Waterways Convention into its final shape, for no sooner was one delicate situation passed than another arose, and it speaks well for the unity of purpose of the Conference and for the tact and discretion of those who led its discussion on this subject that agreement was finally reached. The Statute in its final form is elaborate and lengthy, and future students and lawyers may wonder to what purpose so many words were used to secure an end which in a more liberal age may

seem commonplace. But, hedged round by compromises and conditions, the right of navigation for vessels of all flags is safely guaranteed, though the task of simplifying the Statute will be a worthy object to which future generations of international lawgivers may devote themselves.

There were signs of a widespread desire to go much further than the Statute demands, and accordingly an additional protocol was annexed to the Convention imposing the obligation to grant equality of treatment to vessels of all states reciprocating the privilege on all navigable waterways accessible to and from the sea as regards import and export carrying trade. Adherence to this additional protocol is voluntary, and may cover only naturally navigable waterways or all waterways, but a number of states have already accepted it, including Great Britain.

The Waterways Statute contained the same provisions as the Transit Statute as regards its application in time of war and its bearing on the relations between different parts of the same sovereign state. The provision for the settlement of disputes was also repeated—modified, however, to safeguard the rights of existing or future international river commissions.

The only other legislation at Barcelona was a "declaration recognising the right to a flag of states having no sea coast." It was provided in the treaties of peace that states parties thereto, such as Czecho-Slovakia, which are in this position should be entitled to register at one place in their territory a mercantile marine flying their national flag. This was now extended to neutral states—so that the harbours of states accepting the declaration are now open to vessels flying the Swiss, Austrian, Czecho-Slovak, Bolivian, Paraguayan, or Abyssinian flag.

In addition to the three acts of legislation, the Conference adopted a series of recommendations with regard to traffic of an international character on railways and prepared a standard "Statute for Ports placed under an International Régime." The railway recommendations were placed on the agenda in the form of a draft convention, but for a number of reasons the Conference finally confined itself to a series of recommendations, with which it coupled a request that the League of Nations should summon a further conference within two years to prepare and conclude a general convention on the subject. The Ports Statute was based on the principles laid down in the Transit and Waterways Statutes, and was designed specially for adoption to

govern the commercial use of ports internationalised by the Treaties of Peace or situated in mandated territories, such as Constantinople, Haifa, Alexandretta, or Basra.

Such, then, were the results of the Barcelona Conference. Any attempt to say how much mankind will be healthier, wealthier and wiser as a direct result would be vain, but only bare justice is done if we admit that it framed a respectable if unambitious code to govern commercial movement throughout the world. The most important feature of that code is that provision is made both for its extension and for compulsory jurisdiction by properly qualified courts in the case of disputes arising out of it. Constitutionally the work at Barcelona was admirably done, for it produced a code, an organ of conciliation to interpret and apply that code in the first instance, with ultimate recourse to the Permanent Court, and mechanism for summoning future legislative conferences to amplify the code and thus extend the field of international relations covered by statute law. A long road has to be travelled before international institutions are as complete and symmetrical as the constitutions of modern civilised states, but the Barcelona Conference made its greatest contribution in the distance which it travelled along it.

Indeed, there is only one great problem of international society which it did not touch at least indirectly, namely that of securing the ultimate acceptance of general conventions by the states who sign them. Such conventions are not effective until ratified, and the labours of Barcelona will have been in vain if sufficient states do not ratify the conventions. Once a conference is dispersed, interest evaporates, more urgent and immediate problems call for attention, and general conventions run a great danger of being pigeon-holed. It was outside the province of Barcelona to touch upon this, but an inaccurate impression of the results of the Conference would be given if this point were not made. The method of subsequent individual ratification demanded by present ideas of state sovereignty is clumsy and dilatory, and sets a premium on indifference : until a procedure is evolved whereby states can ratify conventions *in conference* much labour and expense will be wasted in the preparation of valuable international agreements which never become effective.

NOTES

THE WASHINGTON CONFERENCE (November 12, 1921–February 6, 1922)

The principal results of the Washington Conference—the Naval Treaty, the Pacific Treaty, the Shantung Treaty, and the two China Treaties—contain little of direct interest to the student of international law. The appointment of a Commission to study the existing system of exterritorial jurisdiction in China, and to make recommendations with a view to paving the way for its ultimate abolition, marks another stage in the process of bringing the judicial systems of Oriental countries into harmony with those of the West, although it does not seem likely that any very definite steps in the direction of the abolition of exterritoriality in China will be possible in the immediate future. The subsidiary results of the Conference in connection with the laws of war are, however, sufficient to ensure it a place in the history of the development of international law, and these results will be very properly connected with the name of Mr. Elihu Root.

The second item on the agenda of the Conference was "Rules for control of new agencies of warfare." The results of the consideration of this question by the Conference were the following documents: (1) The Treaty concerning the use of submarines and gas, (2) the Report of the Committee on aircraft, (3) the Report of the Committee on gas, (4) the Resolution providing for a Commission to consider changes in the laws of war which may have been necessitated by the introduction or development since the last Hague Conference of new agencies of warfare.

A brief account of the history of these documents may be of interest. It was fully realised at Washington that any attempt to embark on a general investigation of the laws of war was impossible, if only for reasons of time, and no attempt was made to go outside the agenda. At an early stage of the Conference three technical Committees were set up, one on aircraft, one on poison gas, and one on the laws of war. The last of these may be briefly dismissed. It suffered from a certain vagueness in its terms of reference, and the course which the proceedings of the Conference took prevented it from producing any appreciable results; it is understood to have prepared a report, but no opportunity occurred of submitting the report to the Conference for discussion. It was felt, however, that some attempt should be made to provide for further consideration of points on which the laws of war may be regarded as obsolete or incomplete, and towards the end of the Conference Mr. Root came forward with a resolution providing for the appointment of a Commission with this object. This was finally adopted in the following terms:—

"The United States of America, the British Empire, France, Italy and Japan have agreed:—

I. That a Commission composed of not more than two members representing each of the above-mentioned Powers shall be constituted to consider the following questions :—

(*a*) Do existing rules of International Law adequately cover new methods of attack or defence resulting from the introduction or development, since the Hague Conference of 1907, of new agencies of warfare?

(*b*) If not so, what changes in the existing rules ought to be adopted in consequence thereof as a part of the law of nations?

II. That notices of appointment of the members of the Commission shall be transmitted to the Government of the United States of America within three months after the adjournment of the present Conference, which after consultation with the Powers concerned will fix the day and place for the meeting of the Commission.

III. That the Commission shall be at liberty to request assistance and advice from experts in International Law and in land, naval and aerial warfare.

IV. That the Commission shall report its conclusions to each of the Powers represented in its membership.

" Those Powers shall thereupon confer as to the acceptance of the report and the course to be followed to secure the consideration of its recommendations by the other civilised Powers.

" Resolved, That it is not the intention of the Powers agreeing to the appointment of a Commission to consider and report upon the rules of International Law respecting new agencies of warfare that the Commission shall review or report upon the rules or declarations relating to submarines or the use of noxious gases and chemicals already adopted by the Powers in this Conference."

The terms of this resolution are largely due to a feeling that the Commission would be more likely to produce useful results if both its size and terms of reference were confined within reasonably narrow limits. Its recommendations will have to be subsequently considered by a larger body, and it is for the five Powers concerned to decide later what that body should be.

The Aircraft Committee was principally concerned with the possibility of an agreed limitation of the aerial forces of the Powers; its report, an extremely interesting document, pronounced against any such possibility in existing circumstances, except perhaps in the case of airships. The Committee did not consider itself qualified to consider the laws of aerial warfare; a draft code, based largely on existing conventional provisions relating to naval warfare, had been prepared in the American delegation, but was never discussed. When the report of the Committee was under discussion by the Conference, a resolution was proposed by the Italian delegation prohibiting aerial attack on undefended towns; but though there was general agreement on the principle, the difficulties of definition proved to be so great that the resolution was withdrawn, the Conference being content that its view on the general principle should be recorded in the minutes of the discussion. The question will no doubt be considered by the Commission which is to consider the laws of war.

The proceedings of the Committee on Gas are of considerable interest. So far as the law is concerned, the views of the Powers represented (as expressed,

for instance, in their reply to the Swiss Red Cross Society of March 26, 1918) had always been that the use of poison gas was prohibited by existing conventions, and that its original use by the Germans in 1915 was, apart from its inhumanity, a clear violation of their international obligations. This view had been laid down in terms in the Treaty of Versailles and the other Peace Treaties. But the real question is whether it is possible to make this prohibition effective. The possible advantages to be gained by a sudden gas attack upon an enemy who is unprotected against it are so great that a prohibition which cannot be relied upon may well be worse than no prohibition at all, and as the technical processes involved in the production of poison gas are to a large extent identical with those employed in the manufacture of harmless substances in daily use, it is impossible to ensure that a gas attack might not be secretly prepared by the conversion of ordinary commercial plant. For these reasons the Committee was of opinion that no effective prohibition of the use of poison gas was practicable.

The Conference, however, led in this matter by Mr. Root, was not prepared to leave the matter there. Even though the technical conclusions of the Committee could not be disputed, it was felt that a solemn reaffirmation of the illegality of this method of warfare would have a great moral effect, and would ensure that the law-breaker would, at any rate, have the public opinion of the rest of the civilised world against him. Accordingly a resolution, by which the five Powers declared the illegality of the use of poison gas, agreed not to use it as between themselves, and invited the other civilised Powers to adhere to this agreement, was introduced by Mr. Root, adopted without opposition, and ultimately embodied in a formal treaty. It was understood that the Powers would remain free to take precautions against a gas attack by a Power which had not accepted the prohibition or was prepared to take the consequences of breaking it, and they will no doubt continue the study of the use of gas, in order that adequate protection may be afforded to their forces.

The question of submarine warfare was not dealt with by any technical committee, but arose out of the discussion of the American proposals for a limitation of naval armament, which in their original form permitted the retention by the Powers concerned of limited but considerable forces of submarines. The British delegation brought forward a proposal prohibiting the use of submarines altogether, on the general grounds that their employment was certain to lead to practices which could not be reconciled with the laws of humanity, and that against surface warships the submarine was really a useless weapon. This proposal failed to meet with acceptance, but the arguments with which Mr. Balfour and Lord Lee supported it made a great impression both on the Conference and on public opinion, Mr. Hughes indeed saying that if any answer was possible to those arguments, it had yet to be given. The result was seen when, after the abandonment of the attempt to limit the forces of submarines which the Powers were permitted to retain, Mr. Root came forward with a resolution dealing with the employment of submarines against merchantmen. This resolution was in two parts. The first was merely declaratory of existing law; it stated the rules which all vessels of war are bound to observe when dealing with merchant ships, and declared that the special nature of submarines did not absolve them from the necessity of observing these rules. The second part of the resolution was admittedly intended to create a new rule of inter-

national law; by it the Powers recognised the practical impossibility of using submarines " as commerce destroyers " without violating the rules which had been stated in the first part of the resolution, agreed as between themselves to prohibit their use for this purpose, and invited all the civilised nations to adhere to this prohibition, to the end that it should be universally accepted as a part of the law of nations. This extremely important innovation was accepted in principle without difficulty; a suggestion was made that the wording of the resolution should be referred to the jurists for examination, but Mr. Root successfully opposed this in a vigorous speech in which he played the part of a candid friend to the members of his own profession; and the resolution, with a few minor changes, was adopted and ultimately combined with the gas resolution in a treaty which was signed by the representatives of the United States, the British Empire, France, Italy and Japan, and is open to the adhesion of all civilised Powers.

The international lawyer may think (if only to justify his own existence) that if the proposal to refer the wording of the resolution to the jurists had been adopted certain minor obscurities might have been removed; but Mr. Root was probably right in taking the tide at the flood, and there can be no serious doubt as to the general effect of the Treaty. And as nearly every nation suffered from the submarine campaign against commerce during the late war, it may be anticipated that the Treaty will meet with such general acceptance as to become a recognised part of the public law of the civilised world.

H. W. Malkin.

THE MONACO CONGRESS ON AERIAL LAW

The Fourth International Congress on Aerial Law was opened on the 19th December, 1921, at Monaco, under the patronage of H.R.H. Prince Albert of Monaco. Previous Congresses had been held at Paris (1911), Geneva (1912), and Frankfort (1913), and progress had been made with the preparation of a Code of Air Law. The war put an end to these meetings, and much has happened during the time that has elapsed since the last meeting in proving the capacity of aircraft not only for belligerent, but also for peaceful purposes. Fifteen nationalities were represented at Monaco, and Professor A. de Lapradelle of the University of Paris presided. The only British member present was Mr. E. S. M. Perowne, the Chairman of the Aviation Committee of the International Law Association, to whom and to the report contained in *La vie des peuples* (Vol. VI. p. 379) I am indebted for the information contained in this note.

The Congress first took into consideration the Convention for the regulation of Aerial Navigation of the 13th October, 1919 (at present unratified), on which M. Henry-Couannier presented a report. It may be remarked in this connection that M. Henry-Couannier presided over the Aviation section of the International Law Association at the Hague meeting last September. The Report drew attention to various omissions from the Convention: the absence of all provisions for the regulation of the use of aircraft in time of war; the absence of rules common to all states for liability for damage caused by airmen to private property; the absence of any distinction between rules for flying by day and night. It also dealt with certain Articles which stood in need of amendment, *e. g.* Article 7, relating to the nationality of aircraft, which is insufficiently

explicit when such craft are the property of companies; Article 15, as to landing, and Article 34, fixing the composition of the International Committee of Aerial Navigation, which in effect leaves the control of the Commission to the five great Allied Powers.

Notwithstanding these defects, the Congress unanimously resolved that though the Convention was far from perfect, the signatory States and others invited to adhere should be asked to bring it into force as soon as possible. The representative of the United States abstained from voting solely on technical grounds, as the Convention in certain Articles involved a relation to the League of Nations, of which the United States is not a member.

Professor Pittard of Geneva introduced the text of the draft Code of the Law of the Air which had been under consideration before the war. Some few decisions were taken, and the Congress accepted the invitation of the Government of Czecho-Slovakia to hold their next meeting at Prague in September of the present year. The British Committee of "Le Comité juridique international de l'Aviation," of which Professor Sir Erle Richards was formerly Chairman, is at present engaged in a study of the draft Code, which is to be further considered at the forthcoming Congress.

A. Pearce Higgins.

SECOND INTERNATIONAL CHILD WELFARE CONGRESS

The Second International Congress for the promotion of Child Welfare was held at Brussels from July 18th to 21st, 1921, under the presidency of M. Carton de Wiart, Prime Minister of Belgium.

The Congress included official representatives deputed by the Governments of thirty-five countries, representatives of the League of Red Cross Societies, Geneva, and representatives of a number of societies and institutions concerned with questions of child welfare.

The work of the Congress was distributed among four sections, dealing respectively with :—

(1) The Moral Welfare of Children, and Children's Courts. (2) Abnormal Children. (3) Health of Children and Race Culture. (4) War Orphans.

In addition the Congress was invited to consider a proposal for the establishment of an International Office for the Promotion of Child Welfare. The first International Child Welfare Congress, held in Brussels in July 1913, had expressed itself in favour of the establishment of such an Office at Brussels, and had requested the Belgian Government to prepare a scheme for its constitution. Such a scheme was duly prepared, but the war intervened, and delayed further action. The Belgian Government's proposals, which provided for the establishment of an International Association for the Promotion of Child Welfare, with its headquarters at Brussels, were submitted for the consideration of the official delegates of the thirty-five countries represented at the second Congress. The draft constitution of the Association defined its objects as follows :—

"1. To serve as a bond between those who, in different countries, take an interest in Child Welfare;

"2. To facilitate the study of questions referring to Child Welfare and to encourage any legislation that may promote the safeguarding thereof, as well as the conclusion of international agreements."

The draft as submitted made no allusion to the Covenant of the League of Nations, and seemed to have been prepared without reference to it. Objections were raised to the scheme on the ground that the creation of the League of Nations had completely altered the situation since 1913; that in view of the provisions of Article 24 of the Covenant any international organisation founded for the promotion of Child Welfare should be placed under the direction of the League; and that some of the subjects specified in the draft constitution as questions of Child Welfare coming within the scope of the proposed Association were already expressly dealt with in the Covenant.

These objections found expression in the following resolution, which was put forward by the delegates of Great Britain and of the Union of South Africa :—

> " That this Conference, whilst recognising that an International Organisation for the Protection of Children is desirable, considers that the formation of such an organisation should in the first instance be referred to the League of Nations, which by its constitution is the most suitable body to deal with the matter."

This proposal was rejected by 24 votes to 6—one country abstaining.

With a view, however, to meeting in some measure the objections raised, the Belgian Government's draft was amended by omitting from the clause defining the scope of " child welfare " the following subjects, which are referred to in Article 23 of the Covenant and are thus brought definitely within the sphere of the League : measures against the traffic in children; prevention of prostitution of minors; protection of young workers; supervision of the employment of children in factories and at home; and the resolution adopting the draft was prefaced by the words, " subject to express reservation of the rights of the League of Nations, as resulting from the Treaty of Versailles."

With these amendments the Belgian Government's scheme was adopted by the vote of 24 countries to 4, one country abstaining.

The countries whose delegates voted in favour of the proposal were :— Chile, Cuba, Spain, United States of America, France, Greece, Italy, Japan, Grand Duchy of Luxemburg, Mexico, Protectorate of Morocco, Principality of Monaco, Norway, Panama, Paraguay, Peru, Persia, Poland, Kingdom of Serbia, Croats and Slovenes, Sweden, Switzerland, Czecho-Slovakia, Uruguay and Belgium. The four countries which voted against were :—Great Britain, Australia, the Government of India, and the Union of South Africa; while Denmark and the Netherlands abstained.

The resolution approving the draft constitution of the Association further requested the Belgian Government to invite through diplomatic channels the adhesion of other Governments to the Association.

It is difficult to see how the establishment of this new International Association independently of the League can be regarded as consistent with the intention of Article 24 of the Covenant, which provides that " all commissions for the regulation of matters of international interest hereafter constituted shall be placed under the direction of the League." The official delegates who gave their support to the Belgian Government's proposal declared by their resolution that, while endorsing the constitution of the proposed Association, they wished to reserve the rights of the League of Nations; and it may be hoped that the Assembly of the League will have an early opportunity of examin-

ing the whole question, and considering whether the rights of the League under Article 24 of the Covenant have, in fact, been infringed by the action taken at Brussels, whether it is consistent with loyalty to the League for its members to join an independent Association of the character proposed, and whether the League should not itself make provision for international co-operation in dealing with the problems of Child Welfare.

It may be of interest to note that among the problems of Child Welfare mentioned in the course of the proceedings of the Congress as subjects on which it would be desirable for the proposed Association to initiate international agreements were :—

1. The extension to children of foreigners in each country of the benefits of the laws of the country relating to Child Welfare, including admission to public institutions, on equal terms with the children of nationals.
2. The control of cinemas for the purpose of protecting children and young persons from the influence of demoralising films.

R. Feetham.

L'INSTITUT DE DROIT INTERNATIONAL

The meeting of the Institut de Droit International at Rome on the 3rd–10th October, 1921, was the first regular session since that held at Oxford in August, 1913. Informal meetings were held at Paris in 1919, when arrangements were made to hold a meeting at Washington in 1920. This, however, had to be abandoned, and in May, 1921, the Members met again in Paris for the purpose of filling the large number of vacancies which had been occasioned by death in the intervening years; probably, not since the first meetings of the Institute have so many elections been made at one time. Twenty-five Members were elected from the Associates, and thirty-six new Associates were elected; the new Members and Associates were of twenty-four different nationalities, those of British nationality being :—Members, Sir Sherston Baker and Professor Sir H. Erle Richards; Associates, Dr. Thomas Baty, Dr. Hugh Bellot, The Right Hon. Viscount Birkenhead (Lord Chancellor), Professor A. Pearce Higgins, The Right Hon. Lord Phillimore and Sir Ernest M. Satow.

L'Annuaire de L'Institut (Vol. 28) gives an admirable account of the work and of the other activities in which the members engaged at the meeting in Rome under the Presidency of the Marquis Corsi. Not the least interesting of the latter was the reception accorded them by His Holiness the Pope, on the 5th October, when, in reply to a short address of the President, he recalled the fact that as a student at the University of Genoa, he had attended lectures on International Law.

No Resolutions were adopted at this meeting, but a report was presented on the Declaration of the Rights and Duties of Nations adopted by the American Institute of International Law at Washington in 1917, and also a draft of *L'Union juridique international* based on that of the American Institute. The Permanent Court of International Justice and amendments in the Covenant of the League of Nations were discussed, but further consideration of these and of the foregoing matters was deferred to the next meeting of the Institut.

A. Pearce Higgins.

THE NATIONALITY OF INCORPORATED COMPANIES UNDER THE TREATY OF VERSAILLES

Before the war incorporated Companies were commonly considered as having the nationality of the State under the laws of which they were incorporated. The war brought about a change, inasmuch as in the belligerent States Companies were considered as enemy Companies not according to this test, but according to the nationality of those persons who in fact controlled them. This new view was taken by the House of Lords in the case *Daimler Co. Ltd.* v. *Continental Tyre & Rubber Co. (Great Britain) Ltd.*,[1] when it was decided that a Company controlled by Germans at the outbreak of the war had not the right to sue before an English Court, although it had been incorporated under British law.

It is of great interest to inquire what has been decided on this point in the Treaty of Versailles, by which peace was restored. The question arises especially with regard:

1. to the settlement, through the Clearing Offices, of debts payable by the nationals of one Power to the nationals of a former enemy Power (Part X. Sect. III. of the Peace Treaty), and

2. to the right of nationals of one of the Allied and Associated Powers to compensation for damage or injury to their property, rights, or interests in Germany during the war (Part X. Sect. IV. of the Treaty).

The Treaty itself gives no direct answer to the question. In the case *Chamberlain & Hookham Ltd.* v. *Solar Zählerwerke G.m.b.H.*,[2] the Anglo-German Mixed Arbitral Tribunal relied upon the fact that both States here concerned had on this point given the same official interpretation to the Treaty. The Treaty of Peace Order 1919 (Sect. II.) declares that " the expression ' Nationals ' in relation to any State includes the subjects or citizens of that State *and any Company or Corporation incorporated therein according to the law of that State*. . . ." The same definition is given in § 5 of the German " Anmeldungsbekanntmachung zum Reichsausgleichgesetz " (official notification based on the law relating to Clearing Offices) of April 30, 1920.

The Franco-German Mixed Arbitral Tribunal at Paris has given two decisions which differ from that which has been just mentioned and which also differ from each other as to the grounds on which they were given.

In one case [3] the Tribunal has admitted that the Treaty considers as nationals of one State an incorporated Company which is under the control of nationals of that State. But a close examination of both Articles 74 and 297, on which the decision relies, shows that they have not the meaning that has been attributed to them. According to Article 74, which refers to Alsace-Lorraine, " The French Government reserves the right to retain and liquidate all the property, rights and interests which German nationals *or* societies controlled by Germany possessed in the territory . . . etc." The very wording of this Article shows that " societies controlled by Germany " are not identified with German nationals; they are separately specified because, though different from German nationals, they are to be treated in the same way as German

[1] L.R. [1916] 2 A.C. 307

[2] *Recueil des Décisions des Tribunaux Arbitraux Mixtes* (Paris: Libr. de la Soc. du Rec. Sirey), p. 722.

[3] *Recueil, op. cit.*, p. 401.

nationals. The same wording is to be found in Article 297 (*b*), § 1. Here again the Treaty does not say that the Allied and Associated Powers reserve the right to retain and liquidate all property, etc., belonging to German nationals, including Companies controlled by them; it says, " The Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging . . . to German nationals, *or* companies controlled by them," showing clearly that, though these companies are subject to the same rules as German nationals, they are not considered as being, as such, German nationals.

The other decision [1] declares that a Company must be considered as having the nationality of the majority of the shareholders. But—quite apart from the uncertain character of such a criterion since there may be no majority of shareholders of any one nationality, or, in other cases, the shareholders may not be known and their nationality not be ascertainable—the Tribunal has arrived at its decision by giving to Article 297 (*e*) a reading which is not warranted by the text.

The Tribunal declared that the wording of Article 297 (*e*) leaves much to be desired and that really the said § (*e*) must stand and be read to mean that the nationals of Allied and Associated Powers, *including any company or association in which they are interested*, shall be entitled to compensation in respect of damage and injury inflicted upon their property, rights and interests in German territory. Now that is not the wording of Article 297 (*e*), which in fact runs thus: " The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights, or interests, including any company or association in which they are interested, in German territory. . . ."

In other words, the Treaty provides that the nationals of any of the Allied and Associated Powers are entitled to compensation for damage or injury inflicted in Germany upon their property, rights and interests, including any property, rights and interests they may have in companies or associations in which they are interested. But it does not follow from this extension that the said companies or associations do thereby possess the nationality of the State to which the said nationals belong.[2]

In conclusion it may be said: By virtue of the Treaty, the measures authorised for the liquidation of German property in the territory of Allied and Associated Powers extend to rights and interests of Germans in Companies within that territory; and the rights of nationals of the said Powers to compensation for injury to their property, rights and interests in Germany include any rights and interests of the said nationals in Companies within German territory. But the question of the nationality of the Companies as such has not thereby been decided by the Treaty. The above quoted provision in the Treaty of Peace Order seems to show that Great Britain has returned for peace time to the criterion generally accepted before the war, and a further inquiry into the problem, for which we have no space here, would probably lead to the conclusion that

[1] *Recueil, op. cit.*, p. 422.

[2] It is noteworthy that the Treaty of Versailles studiously avoided a definition of the nationality of juridical persons in Alsace-Lorraine. Art. 54, § 3, provides that:

" Such juridical persons will also have the status of Alsace-Lorrainers as shall have been recognised as possessing this quality, whether by the French administrative authorities or by a judicial decision."

this was possibly the best course to adopt. Exceptional war measures may have to be taken in time of war according to the political, military and economic considerations which then arise; but when the peaceful intercourse of commerce is resumed, there will hardly be found any other satisfactory or even possible test for the nationality of incorporated Companies than that which the Order in question has officially reaffirmed.

THE EDWARD FRY LIBRARY OF INTERNATIONAL LAW

In the last number of the British Year Book it was mentioned that the Trustees of this Library hoped, when they were provided with sufficient funds, to publish a book catalogue of it, so that its contents might be made generally known. Since that time the representatives of the Carnegie Trust in England have generously provided the requisite funds for the purpose. Accordingly Mr. Headicar, the Librarian of the Trust, has prepared a catalogue of the Library, which will very shortly be circulated. The Library is now deposited in a separate room at the London School of Economics and Political Science, which is freely open to all readers. A cast of a bust of Sir Edward Fry, presented by Lady Fry, has recently been set up in it.

E. A. W.

CARRIAGE OF BELLIGERENT TROOPS BY A NEUTRAL TRANSPORT: THE *GRETA* CASE

There is a curious paucity of recent precedents for the condemnation of neutral vessels for acting as belligerent transports. All the cases in the Reports of British Prize Cases are from the time of Lord Stowell. The cases of the *Caroline* (4 C. Rob. 256), the *Friendship* (6 *Ibid.* 420) and the *Orozembo* (6 *Ibid.* 430) lay down the principles that a neutral vessel employed by or on behalf of a belligerent to carry combatants or intending combatants is liable to be treated as an enemy vessel.

The report of a judgment on this subject delivered by the Vice-Admiralty Court of Hong Kong during the Crimean war will interest our readers. This case, the *Greta*, which has not hitherto been reported, has been extracted from the Colonial Office Records of that Court. The facts in this case bear a striking resemblance to those in the case of the *Friendship*, in which a neutral vessel was chartered in the United States to bring home to France eighty-four ship-wrecked officers and men; she was condemned as an enemy transport. There is, however, a difference between this case and that of the *Greta*, as the Master of the *Friendship* was, in Lord Stowell's opinion, forbidden to carry any cargo, whereas, in the *Greta*, there was a claim to the cargo, and the claimants relied partly on the Declaration made between Great Britain and France on the 28th March, 1854, which exempted neutral goods from condemnation when found on an enemy ship. The claimants were residents and domiciled in Hong Kong, and were found by the Judge of the Prize Court to be directly involved in the knowledge and conduct of the chartering of the vessel for the purpose of the transport to a Russian port of two hundred and seventy Russian officers and men who had been wrecked off the coast of Japan in the Russian Frigate *Diana;* the cargo and ship were both condemned.

This case is a useful precedent, and represents the modern Law of Nations

on this subject. The French Price Court in 1915, in the case of the *Frederico*, condemned a Spanish steamship for unneutral service, the vessel being at the time of seizure on a voyage specially undertaken to transport a number of Germans and Austrians from Barcelona to Genoa in order that they might join their regiments.[1]

A. Pearce Higgins.

VICE-ADMIRALTY PRIZE COURT OF HONG KONG

The *Greta*

Colonial Secretary's Office, Victoria, Hong Kong, 21st November, 1855.

Wednesday, the fourteenth day of November, 1855. Before the Honourable John Walter Hulme, Esq., Judge. The *Greta*, Thaulow, master, Prize Transport in the Service of the Enemy.

Judgment

War having, on the 28th March, 1854, been declared by Her Most Gracious Majesty the Queen of Great Britain and Ireland against the Emperor of All the Russias—the Bremen Brig *Greta*, having on board two hundred and seventy Russian enemies, was, together with her cargo, on the 1st of August, 1855, seized by Her Majesty's Steam Sloop-of-War *Barracouta*, in the Sea of Ochotsk, off the Coast of Saghalien, in Latitude 51° North, Longitude 146° East, while on a voyage from the port of Simoda in Japan, to the Russian port of Ayen, as being a Transport in the service of the Enemy, and consequently a lawful prize to Her Majesty, and brought into the Vice-Admiralty Prize Court of Hong Kong to be adjudicated upon accordingly. The usual Monition having been issued, a claim to the ship was put in by Lieutenant Thaulow, the master, on behalf of Captain Laun, a Bremen subject, as owner; a claim to the cargo was also put in by Pustau and Brodersen, natural born subjects of the King of Denmark. The Acting Queen's Advocate appeared on behalf of the Captors, Lieutenant Thaulow in support of the claim to the ship and Mr. Green as counsel on behalf of the claimants of the cargo.

The facts, as disclosed by the principal witness, Lieutenant Thaulow, Master of the *Greta*, corroborated (with one or two exceptions, which will be pointed out in their proper places), by the First and Second Mates and a Seaman belonging to the *Greta*, coupled with the Ship's log and other documentary evidence appear to be as follows:—

That the *Greta* was originally a British ship built at Aberdeen in 1840, and at that time she went by the name of the *Jane Geary*—that in the year 1854 she was sold to Franz Knoop of Victoria, Melbourne, that in the same year, that is to say, on the 1st November, she was resold by the said Franz Knoop in Hong Kong, China, through his Attorney, Ludvig Auguste Lübeck, to one Eugen Laun, a citizen of Bremen through his agents, Messrs. Pustau and Brodersen, that in March of 1855 she was chartered of Pustau and Company, the Agents of the ship, by Robert P. de Silver, United States' Naval Storekeeper, to take up a cargo of Naval Stores for the United States Squadron at Hakodadi in Japan—that the said vessel, then going by the name of the *Greta*, sailed from Hong Kong on the 22nd April, 1855, on her voyage to Hakodadi in Japan,

[1] Hall, *International Law*, 7th ed., p. 741.

having on board the said United States' Naval Stores, and also a cargo of merchandise belonging to Pustau and Company, who, it distinctly appears from the evidence of Lieutenant Thaulow, the Master, had the direction and management with respect to the *Greta's* employment or trade, and with whom he, the Master, corresponded on the concerns of the vessel or her cargo—that she arrived at Hakodadi on the 18th May, and commenced discharging the American Stores on the 6th June, and completed the discharge on the 15th June. A small portion of Messrs. Pustau and Company's cargo was also discharged or bartered at this port. While at Hakodadi in consequence of some arrangement which took place, the nature of which does not appear, the *Greta*, instead of making the port of Hakodadi her place of destination proceeded on the 21st June on a voyage to Simoda, also a Japanese port, and arrived there on the 4th July—on the 7th discharged some of her cargo, and on the 9th discharged the remainder of her cargo. This appears to be the case from the Log Book, but from the evidence of Lieutenant Thaulow the remainder of the cargo was on board the *Greta* when she left Simoda for Ayen. While at Simoda, a Charterparty was signed for the carriage of two hundred and seventy Russian Officers and Seamen (who had been wrecked off that place in the Russian Frigate *Diana*) from that port, and also another Japanese port named Hada, to Ayen, a Russian port, for the purpose of enabling the said Russians to work their way home through Siberia. One copy of this Charterparty was left with the Supercargo at Simoda, the other is in possession of Lieutenant Pouschkine, the Senior Officer of the Russians: it was made on the 9th July last between the Supercargo and the Master and two of the Russians, of whom Lieutenant Pouschkine was one. The ship was to receive Fifteen Hundred Pounds and Two Thousand Dollars for the service; bills on bankers in London or Amsterdam were given for these amounts, and left at Simoda (with the Supercargo, I infer).

According to the evidence of the Master, Thaulow, all the Russian passengers were taken on board at Hada, in which he is confirmed by the evidence of the Seaman, belonging to the *Greta*, while the First mate states that twelve, and the Second Mate that ten, were taken on board at Simoda; but this is of no great importance. The *Greta* sailed from Simoda on the 10th July under American Colours, and arrived at Hada on the 11th July, from which place she sailed on her voyage to Ayen on the 14th of that month, and was captured on the 1st August by Her Majesty's Steam Sloop *Barracouta*. The American Colours were at the stern when the *Barracouta* came alongside. The Master ordered these colours to be taken down and the Bremen colours to be hoisted. According to the Master's evidence and that of the Seaman, there were no colours on board except the Bremen and American, while the First and Second Mate state that there was also on board the colour representing the German Confederation. At the time of the capture, all the Russian passengers were down below, as the Master did not think that a British man-of-war would let them pass. The hatches were not closed, a sail was thrown over them. It may be remarked that the Log book of the *Greta* is all but silent on the subject of taking Russians on board.

In looking at this evidence, it seems to me impossible to arrive at any other conclusion than that the *Greta* was at the time of her capture a Transport in the service of the enemy—that she was guilty of fraudulent concealment, and

was sailing under false colours—and that she is consequently, according to the course of Admiralty and the Law of Nations, subject to condemnation. Indeed no attempt is made by Lieutenant Thaulow, the Master, on behalf of the owner, to deny the *Greta's* liability in point of strict law to confiscation; but an appeal is made to the sympathies of the Court, and it is urged that "the shipwrecked Russian Officers and Seamen became distressed Mariners on the Coast of Japan, and as such were to be looked upon, not as enemies who had lost their vessel in battle with the British or French fleet, and who had taken refuge on shore to escape becoming prisoners of war; but were to be looked upon with sympathy as a fallen foe whom we were not allowed to abandon, but to whom we were to lend a hand to help them back to their native hearths." While entering my judicial disclaimer against any such doctrine (although individually deeply regretting the sufferings which the prisoners may have undergone, and lamenting, in common with all, the miseries which have arisen out of the present unfortunate but necessary war), let me see where the sympathy of either the owner of the ship or cargo is to be discovered; and nowhere do I find the sympathetic feeling so strongly developed as in securing the sums of fifteen hundred pounds and two thousand dollars for the conveyance of these unfortunate men to Ayen.

I now proceed to the consideration of the question of the claim set up to the cargo on the part of Messrs. Pustau and Company. It is urged by Mr. Green as their Counsel, that, even supposing the ship to be condemned, still the cargo, as being the property of an innocent and distinct owner, would not be liable to confiscation—and for this he cites the case of the *Staadt Embden*, 1 Cr. Rob. 30. He also cites the cases of the *Susan* and the *Hope*, 6 Cr. Rob. 462 and 463 *in notis* for the purpose of showing, that even where the owner of the ship and cargo is the same person, still, if he was ignorant of the illegal shipment by the master which renders his ship subject to condemnation his cargo (being unrepresented) would not be liable. To render these cases applicable, the innocence of Messrs. Pustau and Company must be established. It is further urged, that the present question has been placed beyond discussion by Her Majesty's Declaration of the 28th March, 1854, in which Her Majesty renounces all claims to the confiscation of neutral property found in Enemies' ships, and *a fortiori* in neutral ships. The observation just made with respect to the cases cited equally applies to this Order in Council. Do Messrs. Pustau and Company stand in the light of strict neutrals? I think it will be found that the case of the *Atalanta* also reported in 6 Cr. Rob. 440, has a stronger application to the present circumstances, and which will presently be more fully noticed; but before doing so, and before enquiring into the course pursued by Messrs. Pustau and Company, it may be proper to advert to some of the general principles which govern the administration of Prize Law. One of these general principles is that "if a native of one country resides and carries on trade in another for some time, his national character is that of his domicile, not of his birth"—the *Johanna Emilia*, Spinks, Ecl. and Ad. Rep. 317–320. And again in the same volume of reports in the case of the *Abo*, 347–349, it is said "the rule of law is, that in the time of war, the person takes the national character of his residence." The same general principle will be found laid down in Pratt's Story, 59, where various authorities of a somewhat earlier date are cited. Again, in the same work, page 69, it is said to be a fundamental principle of Prize

Law that " all trade with the Enemy is prohibited to all persons, whether natives, naturalized citizens, or foreigners, domiciled in the country, during the time of their residence under the penalty of confiscation "; and also, that " as a general principle, no citizen or subject can be admitted to claim in a Prize Court where the transaction in which he is engaged is in violation of the municipal Law of his country "—*ibid.* 20, 21; although this rule is not to be applied to *foreign* neutral proprietors, *ibid*, 52. Messrs. Pustau and Company have been domiciled and resident in the British Colony of Hong Kong carrying on trade as merchants for upwards of eleven years. Let us now see whether their conduct has been that of innocent neutrals. My own notion of neutrality is, that a party, to entitle himself to the privilege of a neutral so as to claim restitution of his cargo, should be totally free from all concert, connivance, or participation in that transaction the illegality of which leads to the condemnation of the ship. How far do Messrs. Pustau and Company bring themselves within this principle? It appears that on the 9th July, they, through their Supercargo and through the master of the *Greta*, entered into a Charterparty for the conveyance of Russian enemies to a Russian port to enable them to find their way home. It is this very Charterparty, to which Messrs. Pustau and Company are so instrumental, which converts the *Greta* from a state of neutrality into a state of hostility, after which they still continue their cargo on board. How then can it be said that their conduct has been that of innocent neutrals? It appears rather that they bring themselves within those general principles of law which have already been adverted to, and they have no right to come into this Court and claim restitution of their cargo.

And now let me call attention to the case already alluded to—the *Atalanta*. In that case, certain Despatches from the Governor of the Isle of France to the Minister of Marine at Paris were, during the time of war, taken on board the Bremen ship *Atalanta*, a neutral vessel, by the Master and one Supercargo, and afterwards found, on her capture, concealed in the possession of a second Supercargo. It is true that in that case the owners of the ship and cargo were the same, but Lord Stowell, then Sir William Scott, in his judgment expressly disclaims condemning the cargo upon this ground alone. Having already condemned the ship, he goes on to say, " Then comes the other question, whether the penalty is not also to be extended further to the cargo, being the property of the same proprietors—*not merely* ' *ob continentiam delicti*,' *but likewise, because the representatives of the owners of the cargo are directly involved in the knowledge and conduct of this guilty transaction?* On the circumstances of the present case I have to observe that the offence is as much the act of those who are the constituted agents of the cargo, as of the Master who is the agent of the ship. The general rule of law is, that where a party has been guilty of an interposition in the war, and is taken *in delicto*, he is not entitled to the aid of the Court to obtain the restitution of any part of his property involved in the same transaction. It is then said that the term ' interposition in the war ' is a very general term, and not to be loosely applied. I am of opinion that this is an aggravated case of active interposition in the service of the enemy, concerted and continued in fraud, and marked with every species of malignant conduct. In such a case I feel myself bound, *not only* by the general rule ' *ob continentiam delicti*,' *but by the direct participation of guilt in*

the Agents of the cargo." Both ship and cargo were accordingly condemned. These observations, for the most part, appear to me directly applicable to the present case.

I have been requested by Mr. Green, on behalf of Messrs. Pustau and Company, that, even should I feel myself constrained to condemn both the ship and cargo, still that I will express it as my opinion, that the *Greta* left this port without any idea on the part of Messrs. Pustau and Company of aiding the Enemies of Great Britain. I am perfectly willing so to do, being satisfied that, notwithstanding any irregularity in the *Greta's* papers or colours, up to the time of her arrival at Hakodadi, they acted with the best intentions and in perfect good faith—but I regret that, from the time of her arrival there, every step which was taken meets with my entire disapprobation; and I cannot help feeling that Her Majesty's Government had a right to expect a different line of conduct from gentlemen who tell you upon their oaths that for upwards of eleven years they have received the protection of the British Flag and enjoyed the blessings of the British Constitution.

I must therefore pronounce both ship and cargo subject to condemnation.

(*Signed*) JOHN WALTER HULME.
Judge.

True Copy.

(*Signed*) W. F. BEVAN.
Acting Judge's Clerk.

(*Endorsed*)
Copy of Judgment of Chief Justice Hulme in the case of the Prize Brig *Greta*.
14*th November*, 1855.

Enclosure in Despatch No. 172 of 1855.

I certify that the foregoing is a true and authentic copy.
(*Signed*) G. F. HANDCOCK.
Assistant Keeper of the Public Records.

10*th July*, 1911.

DIGEST OF CASES

CASES DEALING WITH INTERNATIONAL LAW DECIDED BY THE ENGLISH COURTS DURING THE PAST YEAR

By ANDREW ERIC JACKSON, LL.D., O.B.E., Solicitor.

THE Judicial Committee of the Privy Council have again had before them in the case of the *Pellworm* and other vessels (1922, 1 A.C. 292) the duty of the captors to the neutral State when ships have been captured *bona fide* in neutral territorial waters. The Judicial Committee upheld the decision of the Prize Court that the capture of the *Pellworm* and the other ships in question had taken place in Dutch territorial waters although the vessels had been ordered to stop their engines and had hauled down their flags outside the territorial waters, and that the mere hauling down of the flags on stopping the engines on the orders of the captors was not equivalent to capture. The four German ships in question had been subsequently requisitioned for the use of the Crown under an Order of the Prize Court. Two of the ships whilst under requisition were sunk by German submarines.

The Judicial Committee ordered that the Dutch Government were entitled to have the two ships which remained afloat returned to Dutch waters free of expense, and that with regard to the two ships that had been sunk by the Germans, the Dutch Government were entitled to have the appraised values handed over to them, but no compensation for the use of the ships by the Crown. The Judicial Committee further held that notwithstanding that by the Treaty of Versailles German ships over 1600 tons gross had to be handed over to the Allies, this did not affect the position as between the Dutch Government and the British Government so far as the Prize Court was concerned, though it would be open to the British Government to represent to the Dutch Government that, having regard to the Treaty, the vessels or their value might be fairly handed back to the British Government after they had been returned to the Dutch Government.

In the case of the *Blonde* and other vessels (1922, 1 A.C. 313) the Judicial Committee reversed the Order of the Prize Court.[1] The *Blonde* and other vessels were German ships, lying at the outbreak of war in British ports. The Judicial Committee decided that Article 2 of the Hague Convention No. 6 was binding upon the British Government, and was not dependent upon whether Germany and Great Britain had actually agreed to allow days of grace as contemplated in Article 1 of Convention No. 6. They further held that the Convention was binding irrespective of the conduct of Germany during the war in committing many acts in defiance of the Hague Conventions, and that by

[1] For fuller discussion of this case see *supra*, p. 67.

accepting the " Chile " forms of orders of detention the British Government had recognised the Convention as binding and had waived any right to rely upon nonfulfilment by both countries of Article 1 of the 6th Hague Convention.

They ordered that the *Blonde* and all other ships detained in British ports at the commencement of hostilities or the appraised value of such of them as had been sunk were the property of the German owners and should be handed back to them, subject to any rights which the custodian of enemy property might have therein, where the ships were under 1600 tons; and where the ships exceeded 1600 tons that the ships or their value should be handed to the Crown, who had become the owners on behalf of the Allies under the Treaty of Versailles.

The decision of the Prize Court in the case of the *Rannveig* was upheld by the Judicial Committee of the Privy Council (1922, 1 A.C. 97). The *Rannveig* was a Norwegian steamship which was captured after the Armistice, carrying a cargo of salt herrings, which were conditional contraband as foodstuffs, from Norway to Stettin. The Judicial Committee held that Stettin having been found to be a base of supplies during actual hostilities, continued to be so during the Armistice, and that the Armistice did not prevent the capture and condemnation of the vessel carrying conditional contraband to such a base of supplies.

In the case of the *New Sweden* (1922, 1 A.C. 229) the Judicial Committee confirmed the decision of the Prize Court that the captors were not liable for damage to goods which had been ordered to be discharged at a British port under the Order in Council of March 11, 1915, where the damage was caused by fire and not by any unreasonable action or negligence or wilful default of the captors. The goods in question had been discharged at Kirkwall and sent to London for examination, and a quantity of the goods had been damaged by fire whilst in the train passing through Scotland. The damaged goods were subsequently on examination seized and sold and the proceeds had been released to the appellants' solicitors by the Procurator-General. The owners claimed from the captors the difference between the value of the proceeds and the amount which would have been realised had the goods not been damaged by the fire.

In the case of *Fenton Textile Association* v. *Krassin* (38, T.L.R. 259) the Court of Appeal decided that the Soviet Government's official agent, appointed under the Trade Agreement of March 16, 1921 between His Majesty's Government and the Russian Socialistic Federative Soviet Republic, had not the status accorded to an accredited and recognised representative of a Foreign State, and was not immune from civil process in Great Britain. The agreement provided that official agents thereunder should be immune from arrest and search but did not provide for immunity from civil process.

SUMMARY OF EVENTS [1]

June 1, 1921—April 30, 1922.

COMPILED BY THE BRITISH INSTITUTE OF INTERNATIONAL AFFAIRS.

Abbreviations.

B. of T. J., Board of Trade Journal. *Cmd.*, United Kingdom, Parliamentary Papers. *Cong. Rec.*, United States, Congressional Record. *C. H.*, Current History. *J. O.*, France, Journal Officiel. *L. N. M. S.*, League of Nations, Monthly Summary. *L. N. O. J.*, League of Nations, Official Journal. *R. G.*, Germany, Reichs-Gesetzblatt. *T.*, " Times " (London). *Temps*, " Le Temps " (Paris). *U.S. Tr. Ser.*, United States Treaty Series.

Aaland Islands.

1921, June 24. Awarded to Finland by League of Nations Council, subject to reservation. (*L. N. O. J.*, Sept. 1921.)

June 27. Agreement reached, under auspices of the League of Nations, between Sweden and Finland regarding guarantees for the protection of the Islanders. (*L. N. O. J.*, Sept. 1921.)

Oct. 10–20. Conference held at Geneva, under auspices of the League of Nations; Denmark, Esthonia, Finland, France, Germany, Great Britain, Italy, Latvia, Poland and Sweden represented. Convention signed guaranteeing non-fortification and neutralisation of the Islands (Oct. 20) (*Temps*, 2.11.21, p. 4); ratified by Sweden on Nov. 18, Finland on Dec. 20, Great Britain, France, Germany and Denmark later. League of Nations Council adopted obligations connected with this Convention on Jan. 11, 1922.

Oct. 29. Finnish troops began to evacuate the Islands.

Afghanistan.

1921, Nov. 22. Treaty of friendship signed with Great Britain at Kabul. (*T.*, 24.11.21, p. 10.)

See also *Persia, Russia, Turkey.*

Albania.

1921, June 25. Albania (admitted as a member of the League on Dec. 17, 1920, but without definition of boundaries) appealed to the League Council against the atrocities committed by Serbs in occupied areas, and demanded the frontiers of 1913. The Council declining to interfere, Albania appealed to the Assembly of the League.

Oct. 3. Commission of Enquiry on Albania appointed by the Assembly of the League.

Nov. 9. Conference of Ambassadors reached decision concerning Albanian frontiers.

Nov. 12. Albania formally recognised by Great Britain, France, Italy and Japan.

Nov. 16–19. Extraordinary Session (15th) of the League Council (called at instance of British Government) considered institution of Economic

[1] This is a continuation and amplification of the List of International Agreements hitherto published in the *Year Book*. The information has been collected from newspaper and other sources, and it has not been possible in every case to test its accuracy. References in brackets indicate where texts or summaries of texts are to be found.

Blockade against Serb-Croat-Slovene Kingdom. Decision accepted by Albania and Serb-Croat-Slovene Kingdom. (*L. N. O. J.*, Dec. 1921.)

Dec. 10. Evacuation begun by Serb-Croat-Slovene troops of territory occupied within new frontiers of Albania.

Dec. 22. Albanian Parliament "dismissed" the Bektashi and Roman Catholic Regents, which led to the abdication of the Sunni and Orthodox Regents.

1922, Jan. 18. Commission of Conference of Ambassadors for the delimitation of the Albanian frontiers met at Paris.

Mar. 24. Albanian independence recognised by Serb-Croat-Slovene Kingdom, and on April 7 by Sweden.

See also General International Agreements.

Angora. See *Turkey.*

Argentine. See *Colombia, Great Britain.*

Armenia. See *Genoa Conference, Russia, Transcaucasia, Turkey.*

Austria.

1921, June 22. Convention with France of Aug. 3, 1920, concerning Austrian debts, prolonged to Aug. 31, 1921.

July 2. United States formally declared end of war with Austria. Treaty of peace between United States and Austria signed at Vienna on Aug. 24; ratified by United States Senate on Oct. 18; ratifications exchanged at Vienna on Nov. 8; proclaimed by President Harding, Nov. 17.

Aug. 1. Commercial convention with Romania expired.

Oct. 15. Portugal ratified Peace Treaty of St. Germain, signed on Sept. 10, 1919. [Cmd. 1576.]

Dec. 1. Convention signed at the Hague between Austria and the Netherlands, dealing with the application of the Extradition Convention signed at Vienna on Nov. 24, 1880, between Austria-Hungary and the Netherlands.

Dec. 16. Political agreement (Treaty of Lana) concluded at Prague with Czecho-Slovakia; to hold good for five years after ratification. Ratifications exchanged March 15, 1922.

1922, Feb. 11 (?). Provisional Commercial Treaty signed with Hungary by which each granted the other most-favoured nation treatment.

Feb. 4. Agreement made at Prague by which Czecho-Slovakia agreed to advance a loan to Austria. On Feb. 8, Great Britain, Italy and France promised credit in various amounts to Austria.

See also *Austria-Burgenland, Russia,* and General International Agreements.

Austria—German West Hungary (Burgenland).

1921, July 26. Burgenland officially became Austrian territory.

Sept. 2–23. Notes exchanged between Ambassadors' Conference and Hungary regarding delay in Hungarian evacuation of Burgenland.

Sept. 27. Burgenland proclaimed an independent State by Herr Friedrich, former War Minister and Premier of Hungary.

Oct. 3. Hungary formally transferred Burgenland to Inter-Allied Commission.

Oct. 11. Austrian and Hungarian delegates met at Venice in accordance with invitation of Italian Government. Protocol signed on Oct. 13, embodying terms of agreement. Hungary to clear Burgenland of insurgents, Austria to accept plebiscites for Oedenburg and other districts. Approved by Ambassadors' Conference on Oct. 28. Ratified by Austrian National Assembly on Nov. 30. Oedenburg plebiscite held, under terms of Venice protocol, Dec. 14–17, 65 per cent. voted in favour of union with Hungary. Austrian President ratified Venice protocol on Dec. 29, but did not accept the result of the Oedenburg plebiscite.

1922, Jan. 1. Austria assumed control in the Burgenland. Oedenburg formally transferred to Hungary by Inter-Allied Commission.

Azerbaijan. See *Genoa Conference, Russia, Transcaucasia, Turkey.*

Baranya. See *Hungary.*

Barcelona Conference. See *League of Nations.*

Belgium.

1921, July 20. Convention with Great Britain relative to Art. 296 of Treaty of Versailles (enemy debts) signed. [Cmd. 1543.] Ratifications exchanged on Sept. 30. Treaty promulgated in Belgium on Oct. 13, 1921.

July 25. Economic convention with Luxembourg signed, to come into force on April 1, 1922. Ratifications exchanged March 6, 1922.

Dec. 31. Ruanda (East Africa), territory ceded to Great Britain by Anglo-Belgian Convention of March 15, 1921, handed over to British authorities.

1922, Feb. 4 (?). Belgian-Hungarian Mixed Arbitral Tribunal established.

See also *Cannes Conference, France, Genoa Conference, Germany, Hungary, International Danube Commission, Latin Monetary Union, Leipzig Trials, Luxembourg, Spain, Washington Conference, and* General International Agreements.

Bessarabia. See *Romania.*

Bolivia. See *Chile, Germany, Great Britain.*

Brazil.

1921, July 4. International arbitration agreement signed by North American Chamber of Commerce and the Brazilian Federation of Commerce.

Aug. 8. Brazil ratified Money Order Convention with United States.

Sept. 22. Ratifications exchanged at Rio de Janeiro of agreement with Great Britain for exchange of Money Orders, signed March 1, 1921. [Cmd. 1562.]

Oct. 10. Treaty with Italy signed in Rome whereby Brazil accorded assistance and privileges to Italian immigrants.

See also *Great Britain* and General International Agreements.

Bukhara. See *Genoa Conference, Russia.*

Bulgaria.

1921, Sept. 20. British-Bulgarian Mixed Arbitral Tribunal established in London.

Sept. 20. Conference of Ambassadors granted Bulgaria permission to retain temporarily 13,000 frontier guards and gendarmes on a conscript basis.

Dec. 4. Full diplomatic relations resumed between Bulgaria and the United States.

See also General International Agreements.

Cannes Conference.

1921, Dec. 20–30. Small Economic Conference (Russian Consortium) met at Paris to formulate proposals for reconstruction of Europe, to be submitted to Supreme Council at Cannes. France, Great Britain, Italy and Belgium represented.

1922, Jan. 6–12. Cannes Conference. Allied and Associated Powers (except U.S.A.) and Germany represented. (Mr. Harvey, United States Ambassador to Great Britain, was also present.) Mr. Lloyd George's resolution passed proposing a general Economic Conference to be attended by every Power in Europe, including Russia and Germany. [Cmd. 1621.]

Jan. 9. Soviet Government accepted conditions precedent to admission to Genoa Conference.

Jan. 10. Recommendation for formation of Central International Corporation for economic reconstruction of Europe endorsed. (*T.*, 12.1.22, p. 9; 28.2.22, p. 12.) The first meeting of this Corporation was held Feb. 20–27, Belgium, Denmark, Great Britain, France, Germany, Italy, Japan, and United States being represented. Report of Conference of Organising Committee issued.

Jan. 11. M. Briand returned to Paris. Conference adjourned *sine die* on Jan. 12.

Central American Union.

1921, Sept. 9. Constitution of the Central American Union assented to at Tegucigalpa, Honduras, by Republics of Guatemala, Honduras and Salvador (in accordance with Pact concluded at San José, Costa Rica, on Jan. 19, 1921). Promulgated and came into effect on Oct. 3.

Dec. 26. Guatemala ratified Pact of Union " in principle."

1922, Jan. 18. Guatemala withdrew from the Union and resumed her sovereignty

as an independent republic. The Union collapsed on Jan. 29 (?). Salvador resumed her status as independent republic on Feb. 4, and Honduras on Feb. 11.

Central International Corporation. See *Cannes Conference.*

Chile.

1921, Aug. 15. Arbitration Treaty with Sweden (ratified May 3, 1921) promulgated in Chile.

Dec. 12. Invited Peru to concur in holding a plebiscite to decide the question of Tacna and Arica. Peru refused.

1922, Jan. 17. United States invited Chile and Peru to a Conference at Washington, Bolivia requested leave to participate in these negotiations (Jan. 23), but Chile objected (Jan. 24).

See also General International Agreements.

China.

1921, Sept. 7. Japan made conditional offer to China in regard to Shantung. (*Temps*, 21.9.21, p. 4.) China replied on Oct. 5, taking exception to Japan's offers. (*T.*, 8.10.21, p. 8.) Further Notes exchanged on Oct. 19 and Nov. 3. (Summary: *T.*, 24.10.21, p. 9; 7.11.21, p. 9) without agreement.

Nov. 7. Tariff Treaty of Oct. 20, 1920, between China and United States proclaimed (U.S. Treaty Series, No. 657).

1922, Mar. 28. Agreement reached with Japan (following the signature of the Shantung Treaty on Feb. 4 at Washington), ensuring evacuation of the Shantung railway zone by Japan.

See also *Germany*, *Japan*, *Russia*, *Washington Conference*, and General International Agreements.

Colombia.

1921, Aug. 12. Exchange of ratifications of General Treaty of Arbitration with Argentine. (Signed at Washington, Jan. 10, 1912.)

Dec. 24. Chamber of Deputies ratified Treaty of April 6, 1914, in settlement of Panama dispute between United States and Colombia, thereby recognising independence of Panama. Ratifications exchanged March 1, 1922.

See also *Great Britain* and General International Agreements.

Conference of Ambassadors. See *Supreme Council.*

Costa Rica. See *Panama*, *United States*, and General International Agreements.

Crimea. See *Russia.*

Cuba. See General International Agreements.

Czecho-Slovakia.

1921, June 1. Chamber approved Commercial and Customs Treaty concluded with Serb-Croat-Slovene kingdom.

June 7. International Boundary Commission fixed frontiers in region of Teschen and Orava.

June 23–24. Conference held at Marienbad with Hungary to arrange a Commercial Treaty.

July 2. Military convention signed with Romania.

July 22. France ratified Czecho-Slovak Treaty of St. Germain, signed Sept. 10, 1919.

July 31. Military convention signed with Serb-Croat-Slovene kingdom.

Aug. 30. Conference held at Marienbad with Poland, to establish friendly relations. Treaty signed at Prague on Nov. 6.

Oct. 20. Commercial Treaty with Poland, on most-favoured nation basis, signed.

Oct. 26–Nov. 25. Conference at Portorose, between Italy and Austrian Succession States. Economic conventions signed on Nov. 24.

Nov. 10. Commercial Treaty of April 23, 1921, with Romania, came into force. Ratified by Czecho-Slovakia on Dec. 8, 1921.

Nov. 19. Commercial agreement concluded with Spain by exchange of Notes of Sept. 16, Oct. 26, and Nov. 19, 1921. (*B. of T. J.*, 15.12.21, p. 633.)

See also *Austria*, *Genoa Conference*, *Great Britain*, *Hungary*, and General International Agreements.

Daghestan. See *Transcaucasia.*

Danzig.

1921, June 22. League of Nations Council entrusted Poland with land defence of Danzig and maintenance of order in emergency.

July 30. Danzig munition factories closed by order of the League of Nations.

Aug. 6. Convention between Poland, Danzig and Germany for freedom of transit through East Prussia, signed at Paris on April 21, 1921, promulgated in Germany.

Aug. 15. Polish-Danzig negotiations with regard to Art. 34 of the Treaty of Nov. 9, 1920, resulted in complete agreement.

Aug. 15. League of Nations decided that the railways of the State of Danzig should belong to Poland, with the exception of those of the port.

Sept. 23. Danzig made an agreement with Poland regarding the administration of the Danzig railways by Poland. Ratified by Polish Diet on Dec. 17; Danzig Senate on Dec. 28, 1921.

Oct. 24. Treaty signed at Warsaw with Poland providing for joint economic administration. Ratified by Danzig Senate on Jan. 1, 1921.

1922, Jan. 10. Period expired during which population of Danzig might opt for German nationality. Vast majority voted for Danzig nationality.

Feb. 24. Coal convention signed with Poland.

See also General International Agreements.

Denmark.

1921, July 27. Convention on aerial navigation concluded with Norway.

1922, April 12. Negotiations with Germany in connection with the retrocession of North Slesvig to Denmark terminated in a Treaty. A number of agreements previously reached regarding passport facilities for borderland inhabitants, regulations as to irrigation of frontier districts, pilotage and fisheries in the Flensborg inlet, etc., were appended as annexes.

See also *Aaland Islands, Cannes Conference, Egypt, Genoa Conference, Lithuania, Norway, Spain,* and General International Agreements.

Ecuador.

1921, Sept. 20. Ecuador ratified Arbitration Treaty with Venezuela, signed at Quito on May 22, 1921.

Egypt.

1921, July 12–Nov. 20. Negotiations held in London between Egyptian Delegation and British Government without result. [Cmd. 1555.]

Dec. 23. Zaghlul Pasha and principal associates arrested.

1922, Jan. 28. Lord Allenby summoned to England. Decision regarding future status of Egypt reached by British Government on Feb. 16. Lord Allenby presented Note of British Government to Sultan, dated Feb. 21, proclaiming British protectorate at an end and Egypt an independent sovereign state. [Cmd. 1592.]

Mar. 16. Independence of Egypt proclaimed. The Sultan became king under title of Fuad the First.

See also *Denmark, Great Britain, Portugal, Sweden,* and General International Agreements.

Esthonia.

1921, July 9. Independence recognised by Gremany.

Nov. 25. Commercial Treaty signed with Ukraine.

See also *Finland, France, International Labour Office, Latvia, League of Nations, Lithuania, Poland, Russia,* and General International Agreements.

Far Eastern Republic. See *Genoa, Japan, Russia.*

Finland.

1921, July 13. Commercial agreement with France signed at Paris. Agreement promulgated in France on July 20. Ratified by Finland, Dec. 20, 1921.

Oct. 29. Commercial agreement with Esthonia signed at Helsingfors.

1922, Jan. 29. Treaty signed with Esthonia providing reciprocal customs preference.

April 22. Limited economic agreement signed with Germany.

See also *Aaland Islands, Lithuania, Poland, Russia, Sweden,* and General International Agreements.

Fiume.

1921, June 5. Agreement signed by Italy, Serb-Croat-Slovene State and Fiume, under which port of Fiume is to be controlled by a *consortium* on which each state will appoint two members.

1922, April 9. Conference at Santa Margherita, between Italian and Serb-Croat-Slovene representatives, to adjust the Fiume problem and other differences arising out of the Treaty of Rapallo.

France.

1921, July 1. Great Britain denounced convention regarding the emigration of labourers from India to the French Colonies, signed at Paris, July 1, 1861.

July 18. Agreement signed with Italy and Monaco concerning frontier zones. Approved by French President on Aug. 3.

July 20. Convention with Great Britain, relative to Art. 296 of the Versailles Treaty (enemy debts) signed in London. [Cmd. 1542.] Promulgated in France on Nov. 8, 1921.

Aug. 3. President approved Agreement with Italy signed on Dec. 7, 1918, concerning the movement of French and Italian subjects in Franco-Italian frontier zones.

Oct. 3 (?). Arbitration proceedings in connection with claims made by France against Peru began at the Hague.

Oct. 4. Convention with Belgium, relating to military service, signed at Paris. Promulgated in France, Oct. 28. (*J. O.*, 6.11.21, p. 12408.)

Nov. 9. Commercial agreements with Italy denounced as from Jan. 31, 1921.

Nov. 9. Agreement of 1906 with Spain, according mutual most-favoured nation treatment, denounced.

1922, Jan. 7. Commercial Treaty signed with Esthonia.

Jan. 12. M. Briand resigned. New Ministry formed by M. Poincaré on Jan. 15.

Jan. 18. Agreement with Great Britain respecting aerial communications revised.

Jan. 30. Provisional commercial agreement signed with Portugal; to last six months.

Feb. 6. Commercial convention signed with Poland.

See also *Aaland Islands*, *Albania*, *Austria*, *Cannes Conference*, *Czecho-Slovakia*, *Finland*, *Genoa Conference*, *Germany*, *Hungary*, *Latin Monetary Union*, *Leipzig Trials*, *Norway*, *Reparations*, *Romania*, *Russia*, *Serb-Croat-Slovene State*, *Silesia*, *Spain*, *Switzerland*, *Turkey*, *Washington Conference*, and General International Agreements.

Genoa Conference.

1922, Feb. 5–9. Notes exchanged between France and Allied Governments. France desired postponement of Conference unless problems to be covered could be agreed upon in advance, etc.

Feb. 8. Russian Soviet Government claimed recognition at Genoa on an equality with other nations.

Feb. 14. Mustapha Kemal Pasha announced that Angora Government would refuse to agree to any decision at Genoa unless Turkish delegation were admitted.

Feb. 22. Delegates of Azerbaijan, Armenia, White Russia, Bukhara, Georgia, Ukraine, Khiva (Khorezm), and the Far Eastern Republic signed protocol at Moscow authorising Soviet Russia to represent them at Genoa.

Feb. 25. Mr. Lloyd George and President Poincaré met at Boulogne. Date of Conference postponed to April 10, 1922.

Mar. 5. Conference held at Belgrade of economic representatives of Czecho-Slovakia, Serb-Croat-Slovene kingdom, Romania and Poland, to discuss attitude to be held at Genoa. (*T.*, 16.3.22, p. 11.)

Mar. 8. United States declined to take part in Conference. (*T.*, 10.3.22, p. 11.)

Mar. 18. Conference, called by Swedish Government preparatory to Genoa Conference, met at Stockholm. Denmark, Sweden, Norway and Switzerland represented.

March 20–22. Preliminary Conference of Allied experts met in London to prepare technical programme for Conference.

April 10. Conference opened. Allied and Associated Powers (except United States of America), Russia, and Germany represented. United States Ambassador to Italy present.
April 16. German-Soviet Reciprocity Treaty signed at Rapallo. (*T.*, 18.4.22, p. 11.)
April 18–23. Mr. Lloyd George sent Note, countersigned by Allied and Little Entente delegations, to German delegation regarding German-Soviet Treaty. (*Temps*, 20.4.22, p. 1.) German and Soviet reply received April 21. (*T.*, 22.4.22, p. 11.) Further Note sent to German delegation by Allied and Little Entente Delegations on April 23.

Georgia. See *Genoa Conference, Russia, Transcaucasia, Turkey.*

Germany.

1921, June 6. Germany denounced Commercial Convention with Switzerland of Dec. 10, 1891; *modus vivendi* reached.
June 7. Anglo-German Mixed Arbitral Tribunal held first session in London.
June 25. Agreement regarding execution of Section IV. of Art. 5 of Versailles Treaty, signed in London on Dec. 31, 1920, promulgated by Germany. (*R. G.*, 4.7.21, p. 777.)
June 26. Proclamation issued ordering dissolution of Einwohnerwehr in Bavaria, and defence forces in Prussia and Escherich (Orgesch).
June 29. Agreement concerning frontier lines in Saar Basin, signed at Paris on Dec. 16, 1920, promulgated by Germany. (*R. G.*, 12.7.21, p. 809.)
July 1. Ratifications of the Sino-German Treaty exchanged at Peking.
July 2. United States made formal declaration of end of war with Germany.
July 6. German proclamation issued concerning industrial property rights of nationals of the United States.
July 12. Convention with France, signed on June 30, 1920, relative to war levies on Alsace-Lorraine, ratified by Germany. (*R. G.*, 12.7.21, p. 812.)
July 20. Treaty with Bolivia, renewing friendly relations, signed at La Paz.
July 31. Further credit of Mk. 50 mill. (gold) received from Holland.
Aug. 6. Convention of July 9, 1920, relative to execution of Art. 312 of Versailles Treaty, promulgated in Germany. (*R. G.*, 6.7.21, p. 1177.)
Aug. 25. Treaty of Peace signed at Berlin by United States and Germany. (*T.*, 26.8.21, p. 8.) Ratified by Reichsrat, Sept. 17, and Reichstag, Sept. 30; United States Senate, Oct. 18. Ratifications exchanged at Berlin, Nov. 11, 1921.
Aug. 28. Trade agreement with Italy signed in Berlin. To operate from Sept. 1, 1921, for nine months.
Aug. 30. Ratifications exchanged at Berlin of supplementary agreement of May 6, 1921, between Soviet Russia and Germany for the exchange of prisoners of war and interned persons.
Sept. 24. Pourparlers between the Government of the Reich and Bavaria on subject of edicts of the President of the Reich and Federal State Rights resulted in a compromise.
Oct. 6. Ratifications exchanged in London of amended agreement of Dec. 31, 1920, respecting Art. 297 of Treaty of Versailles (property, rights and interests). [Cmd. 1563.]
Nov. 12. Ratifications exchanged with Belgium at Aix la Chapelle of Treaty concluded April 23, 1920, concerning transition of administration of justice in the Eupen and Malmédy zones.
Nov. 23. Agreement signed at London between British and German Governments respecting Art. 297 (*e*) of Treaty of Versailles. [Cmd. 1566.]
Dec. 5. Ratifications exchanged with Poland at Warsaw of Treaty of Feb. 12, 1921, concerning interned persons.
Dec. 6. Commercial agreement signed with Portugal.
Dec. 19 (?). Commercial Treaty relating to tariffs signed with Serb-Croat-Slovene kingdom.
Dec. 21. Final protocol on the delimitation of the Saar territory signed at Berlin.
Dec. 31. Diplomatic relations officially resumed between United States and Germany.

See also *Aaland Islands, Cannes Conference, Danzig, Denmark, Esthonia, Finland, France, Genoa Conference, Latvia, Leipzig Trials, Netherlands, Portugal, Reparations, Silesia (Upper), Spain, Switzerland.*

Great Britain.

1921, June 1. Agreement concluded between Great Britain and Italy regarding the division of ex-enemy tonnage.

July 8. Agreement with Sweden signed at Stockholm relative to capitulations in Egypt. [Cmd. 1391.] An agreement on the same subject with Denmark signed at Copenhagen, July 14. [Cmd. 1498.] On Sept. 29 ratifications exchanged at Lisbon of Treaty of Dec. 9, 1920, relative to the abolition of capitulations in Egypt. [Cmd. 1553.]

July 16. Great Britain denounced Treaty with Brazil (signed Nov. 23, 1826) for the abolition of the Slave Trade. She denounced a similar Treaty with the Argentine (signed May 24, 1839) on July 29 [Cmd. 1576]; with Uruguay (signed July 13, 1839) on Aug. 8 [Cmd. 1576]; with Bolivia (signed Sept. 25, 1840) on Aug. 11 [Cmd. 1576]; with Venezuela (signed March 15, 1839) on Aug. 13; with Colombia (New Granada) (signed April 2, 1851) on Sept. 27.

July 26. Ratified Treaty between the principal Allied and Associated Powers and Poland, Romania, the Serb-Croat-Slovene State, and Czecho-Slovakia (signed at Sèvres, Aug. 20, 1920). [Cmd. 1548.]

Aug. 27. Agreement signed at Lima with Peru respecting the mineral property "La Brea y Pariñas." [Cmd. 1571.]

Aug. 31. War which began on Aug. 4, 1914, officially terminated by Order in Council of Aug. 10.

Oct. 5. Hawaiian Islands ratified convention, signed at Washington March 2, 1899, between Great Britain and United States regarding the disposal of real and personal property. [Cmd. 1576.]

Dec. 20. Convention signed with Siam respecting settlement of enemy debts. [Cmd. 1642.]

See also *Aaland Islands*, *Afghanistan*, *Albania*, *Austria*, *Belgium*, *Brazil*, *Bulgaria*, *Cannes Conference*, *Egypt*, *France*, *Genoa Conference*, *Germany*, *Heligoland*, *Hungary*, *Irak*, *Japan*, *Leipzig Trials*, *Norway*, *Portugal*, *Reparations*, *Romania*, *Russia*, *Silesia*, *Sweden*, *Turkey*, *Washington Conference*, and General International Agreements.

Greece. See *Hungary*, *Latin Monetary Union*, *Turkey*, and General International Agreements.

Guatemala. See *Central American Union* and General International Agreements.

Haiti. See General International Agreements.

Hawaiian Islands. See *Great Britain.*

Heligoland.

1921, July 23. Inhabitants sent petition to League of Nations asking for neutralisation of the island under protection of League, or re-annexation to Great Britain.

Holland. See *The Netherlands.*

Honduras. See *Central American Union.*

Hungary.

1921, July 26. Exchange of ratifications of Peace Treaty of Trianon (signed June 4, 1920) by British Empire, Belgium (ratified June 14), Czecho-Slovakia, France (ratified July 22), Hungary, Italy, Japan (ratified June 23), Romania, Serb-Croat-Slovene State, and Siam. Ratification deposited by Greece, Oct. 15, 1921.

July 28 (?). Agreement signed at Riga for repatriation of Hungarian prisoners in Russia.

Aug. 14. Proclamation of Baranya as a Serb-Magyar Republic. On Aug. 17 the Conference of Ambassadors decided that Baranya should not be allowed to form a republic. On Aug. 20 it was evacuated by the Serbs and taken over by Hungarians.

Aug. 22. Diplomatic relations re-established with Great Britain.

Aug. 29. Treaty of peace between Hungary and the United States signed at Budapest. Ratified by U.S. Senate, Oct. 18; by Hungary, Dec. 12; ratifications exchanged at Budapest, Dec. 17, 1921.

Sept. 1. Anglo-Hungarian Mixed Arbitral Tribunal established in London.

Oct. 20–24. Ex-King Karl unsuccessfully attempted to recover Hungarian throne. On Oct. 24 the Conference of Ambassadors sent instructions to Entente representatives in Budapest ordering them to demand that Hungarian Government should proclaim the deposition of Karl. On Nov. 3 Ex-King Karl was exiled to Madeira, where he died on April 1, 1922.

Oct. 30. Treaty signed at Budapest reviving extradition Treaty between Great Britain and Hungary signed at Vienna on Dec. 3, 1873, together with a declaration of amendment, signed in London on June 26, 1901.

Dec. 20. Convention signed with Great Britain respecting settlement of enemy debts. [Cmd. 1643.]

See also *Austria, Austria-Burgenland, Belgium, Czecho-Slovakia, Reparations, Russia.*

Iceland. See General International Agreements.

International Air Navigation Congress.

1921, Dec. 19–24. Fourth Congress held at Monaco.
See Note, p. 182.

International Commission of the Elbe.

1922, Jan. 31–Feb. 22. Fourth Session of the Commission held. Text of permanent statute agreed to.

International Chamber of Commerce.

1921, June 21–July 1. First sitting of Second Congress in London. Twenty nations represented.

Oct. 5. Conference to consider question of international exchanges, etc., opened at Paris.

International Congress of Child Welfare.

1921, July 18–21. Second Conference held in Brussels.
See Note, p. 183, *supra.*

International Danube Commission.

1921, July 23. Convention signed for internationalisation of Danube. Bratislava (Pressburg) chosen as seat of Commission for term of five years. First sitting held there, Aug. 17–25.

1922, Mar. 22. Belgian Senate ratified Bill approving protocol of Danube Commission.

Inter-Allied Financial Conference. See *Reparations.*

International Labour Office.

1921, July 5. Eighth Session of Governing Body at Stockholm.

Sept. 22. Esthonia, Latvia, and Lithuania become Members of International Labour Organisation.

Oct. 19–21. Ninth Session of Governing Body.

Oct. 25–Nov. 19. Third Session of International Labour Conference.

Nov. 11. Tenth Session of Governing Body.

1922, Jan. 17–19. Eleventh Session of the Governing Body.

Feb. 28. Fourth International Labour Conference.

April 4–7. Twelfth Session of Governing Body.

Irak (Mesopotamia).

1921, June 1. Great Britain announced general amnesty (with exceptions) for political prisoners concerned in 1920 rising.

Aug. 23. Emir Feisal crowned King of Irak in Baghdad.

Italy.

1921, Aug. 23. Provisional commercial agreement with Poland signed at Rome.

Sept. 24. Agreement with Switzerland signed at Berne concerning the St. Gothard Tunnel.

Oct. 14. Agreement with Serb-Croat-Slovene State signed with regard to Italian fishing rights on the Dalmatian coast.

Dec. 16. Resumption of relations with Russia conditionally agreed on. Preliminary commercial agreement signed with Russia on Dec. 26. (*C. H.*, March 1922, p. 1034.)

Dec. 27. Commercial agreement signed with Ukraine.

See also *Albania*, *Austria*, *Brazil*, *Cannes Conference*, *Czecho-Slovakia*, *Fiume*, *France*, *Genoa Conference*, *Germany*, *Great Britain*, *Hungary*, *Latin Monetary Union*, *Leipzig Trials*, *Silesia* (*Upper*), *Spain*, *Turkey*, *Washington Conference*, and General International Agreements.

Japan.

1921, July 7. Great Britain and Japan notified League of Nations of continuance of Anglo-Japanese Alliance after July 1921.

July 11. Note delivered to American Minister at Peking from Far Eastern (Chita) Republic, urging United States to call upon Japan to withdraw her military forces from Siberia. Similar Notes delivered to China and Great Britain.

Aug. 25. Ratifications exchanged at Santiago of a commercial Treaty with Paraguay, signed at Asuncion on Nov. 17, 1919.

Aug. 26–April 10, 1922. Conference at Dairen (Dalny) between Japan and the Russian Far Eastern (Chita) Republic with a view to a peaceful settlement in Eastern Siberia and the withdrawal of Japanese troops. No agreement was reached.

Dec. 13. Agreement reached at Washington between United States and Japan, by which the United States recognised Japan's administration of the mandated islands north of the Equator. The Treaty was signed at Washington on Feb. 11, 1922. (*C. H.*, April 1922, p. 120.) Ratified by the United States Senate on March 1, 1922.

See also *Albania*, *Cannes Conference*, *China*, *Hungary*, *Mexico*, *Washington Conference*, and General International Agreements.

Karelia (Eastern). See *Russia.*

Khiva (Khorezm). See *Genoa Conference.*

Latin Monetary Union.

1921, Nov. 21–Dec. 6. International Conference met at Paris. Participants: Belgium, France, Greece, Italy, Switzerland. New agreement, supplementary to the International Monetary Treaty of 1885, signed on Dec. 6. Ratifications to be exchanged at latest on April 15, 1922.

Latvia.

1921, July 12. Political and military agreement with Esthonia signed.

July 27. Conference at Riga between Red Cross Societies in Latvia, Lithuania, and Esthonia to discuss establishment of a sanitary cordon along the Russian frontier.

Aug. 3. Peace Treaty with the Ukraine signed at Moscow.

Sept. 4. Commercial agreement signed with Germany.

Oct. 1. Admitted into the Universal Postal Union.

See also *International Labour Office*, *League of Nations*, *Lithuania*, *Poland*, *Russia*, and General International Agreements.

League of Nations.

1921, June 17–28. Thirteenth Session of Council at Geneva. (*L. N. O. J.*, July 1921. Spec. Supp. No. 5.)

June 30–July 5. International Conference on Traffic in Women and Children met at Geneva. Thirty-four States represented.

Aug. 22–24. Conference on Relief of Russian Refugees. (*L. N. O. J.*, Oct. 1921.)

Aug. 30–Sept. 3, and Sept. 12–Oct. 12. Fourteenth Session of Council. (*L. N. O. J.*, Dec. 1921.)

Sept. 5–Oct. 5. Second Session of Assembly. (*L. N. O. J.*, Oct. 1921. Spec. Supp. No. 6.)

Sept. 14. Election of 11 Judges and 4 Deputy Judges for Permanent Court of International Justice.

Sept. 22. Esthonia, Latvia, and Lithuania admitted to membership of League.

Nov. 16–19. Fifteenth Session of Council. (*L. N. O. J.*, Dec. 1921.)

1922, Jan. 10–14. Sixteenth Session of Council. (*L. N. O. J.*, Feb. 1922.)

Feb. 15. Permanent Court of International Justice opened at the Hague. By June 1, 1922, the following had signed the protocol [Cmd. 1276]: Albania, Australia, Austria, Belgium (May 9, 1921), Bolivia, Brazil, British Empire, Bulgaria (April 10, 1921), Canada (March 30, 1921), Chile,

China, Colombia, Costa Rica, Cuba, Czecho-Slovakia, Denmark, Esthonia, Finland, France, Greece, Haiti, India, Italy, Japan, Latvia, Liberia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Panama, Paraguay, Persia (Nov. 4, 1921), Poland, Portugal, Romania (April 15, 1921), Salvador, Serb-Croat-Slovene State, Siam, South Africa, Spain, Sweden, Switzerland, Uruguay, Venezuela.

The following had ratified it: Albania, June 29, 1921; Australia, July 16, 1921; Austria, July 15, 1921; Belgium, Aug. 17, 1921; Brazil, Sept. 6, 1921; British Empire, July 16, 1921; Bulgaria, July 29, 1921; Canada, July 16, 1921; China, Sept. 29, 1921; Cuba, Sept. 12, 1921; Czecho-Slovakia, Aug. 29, 1921; Denmark, May 19, 1921; France, July 29, 1921; Greece, Sept. 3, 1921; Haiti, Aug. 6, 1921; India, July 16, 1921; Japan, April 9, 1921; Lithuania, Feb. 14, 1922; Netherlands, July 20, 1921; New Zealand, July 16, 1921; Norway, July 28, 1921; Poland, Aug. 22, 1921; Portugal, Sept. 12, 1921; Romania, July 18, 1921; Serb-Croat-Slovene State, July 25, 1921; Siam, Aug. 15, 1921; South Africa, July 16, 1921; Spain, Aug. 2, 1921; Sweden, Dec. 31, 1920; Switzerland, April 16, 1921; Uruguay, Aug. 24, 1921; Venezuela, Sept. 7, 1921.

The following had signed the additional protocol accepting compulsory jurisdiction: Austria (ratified Feb. 13, 1922); Brazil (ratified Sept. 6, 1921, under reservation of the acceptance of compulsory jurisdiction by at least two of the Powers permanently represented on the Council of the League of Nations): Bulgaria (ratified July 29, 1921); China (ratified Sept. 29, 1921); Costa Rica; Denmark (ratified May 19, 1921); Finland (subject to ratification); Haiti (ratification not required); Liberia (subject to ratification); Lithuania (ratified Feb. 14, 1922); Luxembourg (subject to ratification); Netherlands (ratified July 20, 1921); Norway (ratified Oct. 3, 1921); Panama; Portugal (ratified Sept. 12, 1921); Salvador; Sweden; Switzerland (ratified April 16, 1921); Uruguay (ratified Aug. 24, 1921).

See also *Aaland Islands*, *Albania*, *Danzig*, *Heligoland*, *Japan*, *Poland*, *Russia*, *Silesia* (*Upper*).

Leipzig War Criminals' Trials.

1921, July 8. French and Belgian Missions withdrawn owing to acquittal of some of accused. Trials (which began on May 23, 1921) concluded on July 16. Prosecutions: English 6, 5 convictions [Cmd. 1430]; Belgian 1, no convictions; French 5, 1 conviction.

Aug. 12. Supreme Council agreed to refer questions of future action regarding trials of war criminals to an International Commission consisting of representatives of Great Britain, France, Belgium, and Italy. Commission began deliberations on Jan. 6, 1922; recommended that the remaining prisoners should be handed over to the Allies for trial. (*T.*, 16.1.22, p. 9.)

Liberia. See General International Agreements.

Lithuania.

1921, July 13–14. Conference at Riga between Lithuania, Esthonia, and Latvia. Agreement reached on political and economic questions.

July 21–22. Economic Conference at Reval between Lithuania, Esthonia, and Latvia. Resolution accepted in favour of common action in economic, trade, and political matters.

Sept. 29. Independence of Lithuania recognised by Sweden and Denmark; on Sept. 30 by Norway; on Oct. 7 by Holland; on Oct. 16 by Finland.

Dec. 12–20. Conference at Reval between Finland, Latvia, Lithuania, and Esthonia, to consider their relations with Russia in view of forthcoming Russo-Baltic economic conference.

1922, March 5. Lithuania appealed to League of Nations to intervene with Polish Government in order to ensure the inviolability of the neutral zone.

March 29–30. Conference at Riga between Russia and Finland, Latvia, Lithuania, Esthonia, and Poland, to consider question of reconstruction of Eastern Europe.

See also *International Labour Office*, *Latvia*, *League of Nations*, *Poland*, *Russia*, and General International Agreements.

Luxembourg.

1921, Sept. 8. Treaty with Belgium signed at Luxembourg regarding education.
See also *Belgium.*

Mexico.

1921, July 21. Announced that Spain and Japan had recognised Obregon Government.

Monaco. See *France*, and General International Agreements.

Mongolia. See *Russia.*

Muscat. See General International Agreements.

Netherlands.

1921, Aug. 8. Permanent Dutch-German Trade Disputes Court established at Berlin.
See also *Austria, Germany, Lithuania, Serb-Croat-Slovene State, Spain, Washington Conference*, and General International Agreements.

New Hebrides. See General International Agreements.

Norway.

1921, June 1. Norway denounced Commercial Treaty with Poland.
June 30. Agreement signed at Washington between the United States and Norway for the submission to arbitration of certain claims of Norwegian subjects with regard to ships requisitioned during the war. On Feb. 11 President Haab of Switzerland appointed as arbitrator Professor Max Huber.
July 16. Temporary Air agreement signed at Christiania for the establishment of an air service between Norway and Great Britain.
July 27. Air agreement with Denmark signed at Copenhagen; ratified Jan. 4, 1922.
Sept. 26. Norway ratified Treaty of Commerce with France of April 23, 1921.
Nov. 4. Norway informed Denmark that it could not recognise the extension of Danish sovereignty to the whole of Greenland (announced by Danish Government in May 1921). (*T.*, 5.11.21, p. 9.)
See also *Denmark, Genoa, Lithuania, Russia, Spain.*

Palestine.

1921, Aug. 17. Thirty leading Moslems and Arabs invited by Sir Herbert Samuel, British High Commissioner in Palestine, to form a Consultative Council to advise on a new constitution for Palestine.

Panama.

1921, June 27. Panama appealed to Secretary Hughes of United States Government against White award in boundary dispute with Costa Rica. On June 30 Secretary Hughes replied that award must be accepted.
Aug. 23. Panama ceded Coto to Costa Rica.
Aug. 24. President Porras issued protest against action of United States Government in dispute with Costa Rica.
See also *Colombia* and *United States* (Panama Canal).

Paraguay. See *Japan.*

Permanent Court of International Justice. See *League of Nations.*

Persia.

1921, June 22. Treaty signed with Afghanistan providing for an exchange of diplomatic and consular representatives, after having been approved by H.I.M. the Shah at Teheran on Jan. 25, 1922.
See also *Russia* and General International Agreements.

Peru. See *Chile, France, Great Britain.*

Poland.

1921, June 2. Negotiations between Poland and Lithuania at Brussels regarding Vilna (which began on April 20, 1921) suspended: question then submitted to League of Nations Council. (*L. N. O. J.*, Sept., Oct., Nov., 1921; Feb., March, April, 1922.) The League withdrew from direct negotiations on Jan. 13, 1922.

July 25–30. Conference between Poland, Esthonia, Latvia, and Finland at Helsingfors to discuss co-operation of Baltic States in relation to Russia. Concluded without definite political results.

Sept. 14. Poland sent ultimatum to Soviet Russia threatening to break off diplomatic relations unless, by Oct. 1, the latter paid first payments due under Treaty of Riga and restored Polish property. Russia replied (Sept. 23) undertaking to comply with Poland's demands, provided Poland carried out her engagements under same Treaty, and proposing to postpone ultimatum to Oct. 5. Agreement signed on Oct. 5 with Russia by which Russia undertook immediately to return all Polish property.

Sept. 28. Note from Ukraine protesting that Poland had violated Art. 5 of the Treaty of Riga.

1922, Feb. 20. Vilna Diet, by unanimous vote, declared for Union with Poland. (*T.*, 23.2.22, p. 11.) Polish Diet ratified Act of Union on March 24, 1922.

March 13–17. Conference between Poland, Latvia, Esthonia, and Finland at Warsaw. Treaty signed (March 17) by which signatories agreed not to enter into international agreements without the knowledge of all the signatories. (*Temps*, 2.4.22, p. 2; *T.*, 23.3.22, p. 1.) Ratified by Esthonian Parliament on April 23, 1922.

See also *Czecho-Slovakia*, *Danzig*, *France*, *Genoa Conference*, *Germany*, *Great Britain*, *Italy*, *Lithuania*, *Norway*, *Romania*, *Russia*, *Silesia* (*Upper*), General International Agreements.

Portugal.

1921, Sept. 29. Ratifications exchanged at Lisbon of Treaty with Great Britain relating to extradition of fugitive criminals from British protectorates and Portuguese territories.

Sept. 29. Ratifications exchanged of arbitration Treaty, signed at Lisbon by United States and Portugal on Sept. 14, 1920. Proclaimed by President Harding on Oct. 31.

Dec. 6. Commercial agreement signed with Germany.

1922, April 1. Commercial Treaty with South Africa denounced. New Treaty to be negotiated.

See also *Austria*, *Egypt*, *France*, *Germany*, *Washington Conference*, and General International Agreements.

Reparations.

1921, Aug. 9–13. Inter-Allied Financial Conference held in Paris. Convention reached concerning division of German payments. Ratification refused by French Cabinet on Sept. 2.

Aug. 13. Supreme Council agreed to conditional abolition, as from Sept. 15, 1921, of the economic sanctions instituted by it on March 7, 1921.

Aug. 27. Preliminary agreement reached between M. Loucheur and Dr. Rathenau at Wiesbaden, for deliveries in kind from Germany to France on reparation account for the devastated areas.

Aug. 30. Section for Hungary created in Reparation Commission.

Oct. 6. Protocol of Franco-German agreement for supply by Germany of reparations in kind signed at Wiesbaden. Four complementary agreements concerning live-stock, rolling-stock, machinery, and coal, signed on Oct. 7, 1921. [Cmd. 1547.]

Nov. 12. Payment completed of one milliard gold marks by Germany under Art. 5 of the Schedule of Payments.

Dec. 19–22. M. Briand conferred with Mr. Lloyd George in London on Reparations. Agreed to hold Supreme Council at Cannes in January.

1922, Jan. 13. Reparation Commission (meeting at Cannes, after break-up of Cannes Conference) decided to grant provisional delay to German Government for payments due, pending receipt of further information.

Jan. 28. German Government submitted to Reparation Commission, as requested in its letter of Jan. 13, a programme of reform of German Budget and a scheme of payments in cash and kind for 1922.

March 8–11. Inter-Allied Financial Conference held in Paris. Allied Ministers agreed that it should be left to Reparation Commission to determine German payments for 1922.

March 15. Franco-German agreement signed regarding deliveries in kind (Gillet agreement). This agreement modified Wiesbaden agreement of Oct. 6, 1921, so as to take advantage of machinery of Berlin agreement of Feb. 27, 1922.

March 21. Reparation Commission decided conditionally to reduce German payments for 1922.

March 31. Reparation Commission approved, with certain modifications and subject to certain conditions, the various agreements for deliveries in kind. (Oct. 6, 1921, Feb. 27, and March 15, 1922.)

Romania.

1921, July 1. Polish Diet ratified commercial Treaty with Romania of May 21, 1921.

July 2. Polish Diet ratified Military Convention with Romania of March 3, 1921.

July 7. Treaty of alliance signed with Serb-Croat-Slovene kingdom. Commissions nominated to fix the frontier of the two countries, etc.

July 22. France ratified Treaty regarding affairs of Romania signed at Paris on Dec. 9, 1920. [Cmd. 1576.]

1922, April 5. Treaty uniting Bessarabia to Romania ratified by Romanian Senate.

April 18. Romania denounced commercial Treaty with Great Britain, signed at Bukarest on Oct. 31, 1905. [Cmd. 1576.]

See also *Austria*, *Czecho-Slovakia*, *Genoa Conference*, *Great Britain*, *Hungary*, *Serb-Croat-Slovene State*, and General International Agreements.

Russia.

1921, June 4. Ratifications exchanged of transit agreement with Latvia, concluded on Feb. 26, 1921; to hold good for three years from June 4.

June 28. Convention concerning individual optation of nationality concluded with Lithuania.

July 28. Treaty signed with Hungary providing for repatriation of all Hungarian prisoners of war before end of year.

Aug. 13. Ratifications of Treaty with Afghanistan of Feb. 28, 1921, exchanged at Kabul.

Aug. 27. Credits agreement signed by Dr. Nansen with M. Chicherin at Moscow.

Sept. 2. Preliminary Russo-Norwegian Commercial Treaty signed, in all essentials the same as the Anglo-Russian agreement of March 16, 1921. Ratified by Norwegian Storthing on Oct. 1.

Sept. 22. Convention concerning individual optation of nationality concluded with Latvia.

Oct. 18. Independence of Crimea granted by decree of the Russian Central Executive Committee.

Oct. 24. Chinese Consul in Moscow informed Soviet Government that China was prepared to give formal recognition to Russian Trade Delegation.

Oct. 24–25. Finnish "White" bands crossed into Karelia. Nov. 14–28, Notes exchanged between Soviet and Finnish Governments regarding this invasion. On Nov. 22 Finland drew attention of League of Nations to Eastern Karelian question. On Dec. 12 Soviet Government proposed to Finland a joint Russo-Finnish Commission to suppress invading bands. (See Jan. 16.)

Oct. 24–31. Economic Conference at Riga between Russia and Finland, Esthonia, Latvia, and Lithuania. Basis of agreement on questions of transport reached.

Oct. 28. Soviet Note sent to Powers agreeing conditionally to recognise certain Czarist debts. British Government replied on Nov. 1, requesting more definite information. [Cmd. 1546.] French Government replied on Nov. 8 that relations could not be resumed until Soviet Government had fulfilled certain conditions.

Nov. 5. Political agreement signed between Russia and revolutionary Government of Mongolia. (Analysis, "Independent," 108 : 212–213, March 4, 1922.)

Dec. 7. Political and commercial agreement signed with Austria and Ukraine.

Dec. 21. Persia ratified political Treaty signed at Moscow, Feb. 26, 1921.

Dec. 23. Ninth Soviet Congress held at Moscow. The Soviet Republics of Azerbaijan, Armenia, Georgia, Ukraine, White Russia, Bukhara, and the Far Eastern Democratic Republic represented.

1922, Jan. 16. Russian Soviet Government refused intervention of League of Nations in Russo-Finnish conflict over Eastern Karelia. On Jan. 30 Esthonia sent Note to Soviet Government offering to act as mediator. On Feb. 2 Soviet Government rejected this offer. (See Oct. 24–25.)

March 1. Commercial agreement with Sweden signed. No question of *de jure* recognition of Soviet Government by Sweden, but official agents stationed in each country to enjoy diplomatic privileges, etc.

March 8. Commercial Conference opened between Russia, Poland, and Ukraine with a view to the conclusion of a commercial Treaty.

See also *Cannes Conference*, *Genoa Conference*, *Germany*, *Hungary*, *Italy*, *Lithuania*, *Poland*, *Transcaucasia*, *Turkey*.

San Salvador. See *Central American Union* and General International Agreements.

Serb-Croat-Slovene Kingdom.

1921, June 7. Defensive Treaty signed with Romania at Belgrade, guaranteeing the execution of the Peace Treaties signed by Bulgaria (Nov. 27, 1919), Hungary and Austria (Sept. 10, 1919).

June 23. Government decided that their State should continue to be called the "Kingdom of the Serbs, Croats, and Slovenes," and not "Jugoslavia." On June 29 National Assembly adopted the new Constitution. (*C. H.*, Feb. 1922, p. 832.)

July 22. France ratified Treaty regarding the affairs of the Serb-Croat-Slovene State signed at St. Germain on Sept. 10, 1919. [Cmd. 1576.]

Aug. 16. King Peter died. Alexander succeeded.

1922, Jan. 28. Delimitation of new Serbo-Romanian frontier through the Banat of Temesvar completed.

Feb. 8. Diplomatic relations (broken off Dec. 20, 1920) resumed with the Netherlands.

See also *Albania*, *Czecho-Slovakia*, *Fiume*, *Genoa Conference*, *Germany*, *Great Britain*, *Hungary*, *Italy*, *Romania*, and General International Agreements.

Siam. See *Great Britain*, *Hungary*, and General International Agreements.

Silesia (Upper).

1921, May 30–June 7. Six British battalions sent to Upper Silesia owing to disturbances. General Hoeffer's plan for withdrawal of insurgents and German irregulars accepted by Inter-Allied Commission on June 24; agreed to by Germans and Poles on June 26. German troops withdrawn (June 29–July 7).

July 9. The Allied Commissioners in Upper Silesia reported their inability to come to a unanimous decision as to the frontier.

July 16–July 23. Notes exchanged between France and Germany regarding German troops in Upper Silesia.

July 27–29. Notes exchanged between France and Great Britain regarding British objection to despatch of French reinforcements to Upper Silesia.

July 31–Aug. 7. Meeting of experts in Paris to discuss the problem.

Aug. 3. Joint Note by British, French, and Italians presented to Germany, requesting facilities for passage of Allied troops to Upper Silesia if necessary.

Aug. 8–12. Meeting of Supreme Council to consider Upper Silesian question. Decided to refer matter to the League of Nations.

Oct. 12. Decision of League of Nations communicated to Conference of Ambassadors (*L. N. O. J.*, Dec. 1921, p. 1226), who adopted it on Oct. 15 and communicated it officially to Germany and Poland on Oct. 20. Accepted by Poland on Oct. 25, and by Germany under protest on Oct. 27. Germany agreed to appoint delegates for negotiation of economic agreement, etc.

Nov. 23. Negotiations opened at Geneva between German and Polish plenipotentiaries on the Upper Silesian question. Complete agreement as to method of working of Conference reached on Nov. 26. Sub-Commissions appointed. (See Feb. 14, 1922.)

Dec. 19. Demarcation line fixed in industrial district.

1922, Feb. 14. German-Polish Conference regarding Upper Silesia began. (See Nov. 23.)

Slesvig. See *Denmark.*

South Africa. See *Portugal* and General International Agreements.

Spain.

1921, June 19–20. Provisional commercial agreement to last three months signed with Sweden at Madrid.

July 19. Commercial Treaty of July 14, 1893, with Denmark, prolonged for two months.

Sept. 10. Commercial *modus vivendi* with France expired; prolonged to Dec. 10, 1921, by common consent, with power of further prolongation to March 15, 1922.

Dec. 1. Exchange of Notes with Norway; provisional commercial Treaty signed with Norway. Prolonged till April 30, 1922, by further exchange of Notes on April 4, 1922.

Dec. 19. Denunciation by Spain of *modus vivendi* with Netherlands concerning commercial relations. On Jan. 6, 1922, new agreement reached after an exchange of Notes, to become effective Jan. 19, 1922.

Dec. 20. Denunciation by Spain of Treaty of commerce with Germany of Feb. 12, 1899, to take effect Dec. 20, 1922.

Dec. 21. Agreement reached with Belgium (by an exchange of Notes) concerning tariff regulations. Jan. 19, 1922, temporary *modus vivendi* came into force.

1922, Jan. 19. Commercial *modus vivendi* with Switzerland (denounced Dec. 19, 1921) prolonged until Feb. 15, 1922. On Feb. 16 new commercial *modus vivendi* concluded, to last until March 15, 1922.

Jan. 19. Temporary commercial *modus vivendi* with Denmark came into force.

Feb. 11. Spain denounced the Spanish-Norwegian Maritime Treaty.

April 17. Commercial *modus vivendi* accepted by Spain and Italy by an exchange of Notes.

See also *Czecho-Slovakia*, *France*, *Mexico*, and General International Agreements.

Supreme Council and Conference of Ambassadors. See *Albania*, *Austria-Burgenland*, *Bulgaria*, *Hungary*, *Reparations*, *Silesia* (*Upper*), *Turkey.*

Sweden.

1921, July 29. Agreement concluded by exchange of Notes between Sweden and Finland, concerning exchange of notifications with regard to persons of unsound mind.

Sept. 21. Agreement concluded between Great Britain and Sweden by exchange of Notes for reciprocal notification of particulars regarding lunatic nationals in each country.

See also *Aaland Islands*, *Albania*, *Chile*, *Egypt*, *Genoa Conference*, *Lithuania*, *Russia*, *Spain*, and General International Agreements.

Switzerland.

1921, Aug. 7. Convention concluded with France on the question of free frontier zones. Ratified by State Council on March 29, 1922.

Dec. 3. Arbitration Treaty with Germany signed for a period of ten years, which, if not denounced within three months of date of expiration, will run for ten years more. (Adopted by Reichsrat on Jan. 27, 1922.)

See also *Genoa Conference*, *Germany*, *Italy*, *Latin Monetary Union*, *Norway*, *Spain*, and General International Agreements.

Transcaucasia.

1921, June 15. Agreement signed at Paris for economic and political union by Republics of Armenia, Azerbaijan, Georgia, and Daghestan. (Completion of Transcaucasian Federation announced on Dec. 24, 1921.)

Sept. 26–Oct. 13. Conference held at Kars by representatives of Georgia, Armenia, Azerbaijan, Russia, and Turkey. Treaty regulating contentious frontier questions between Turkey and Caucasian Republics signed on Oct. 13, thereby completing Treaty of Moscow signed on March 16, 1921, between Angora Government and Soviet Russia.

Turkey.

1921, June 10. Afghan flag hoisted over new Afghan Embassy at Angora by Mustapha Kemal Pasha.

June 18–19. Conference held in Paris between representatives of Great Britain, France, and Italy. Agreement reached on Greco-Turkish question and Note sent to Greece offering Allied mediation. Greek Government refused offer on June 25.

June 28–Sept. 11. Greeks abandoned Ismid on Sea of Marmora. Bolsheviks evacuated Enzeli. New Greek campaign against Turkish Nationalist forces for control of Asia Minor (July 10 (?)–Sept. 11).

July 21. Treaty of peace and alliance between Nationalist Turkey and Soviet Russia ratified by Angora Assembly. Ratifications exchanged at Kars on Oct. 2 (?).

Aug. 10. Supreme Council proclaimed Allied neutrality towards Greco-Turkish conflict.

Sept. 26–Oct. 13. Conference held at Kars with Russia, Azerbaijan, Georgia, and Armenia. Treaty signed (Oct. 13) regulating relations between Angora and those mentioned.

Oct. 20. Franco-Turkish agreement signed at Angora. [Cmd. 1556.] Ratified by France, Oct. 30 (Angora Assembly had ratified it before exchange of signatures). Nov. 5–Dec. 15, Notes exchanged between British and French Governments regarding agreement. [Cmd. 1570.]

Dec. 1. Turks occupied Mersina in Cilicia.

1922, Jan. 2. Treaty of friendship with Ukraine signed at Angora. Turkey ratified on Jan. 10.

March 22–26. Near East Conference held in Paris, attended by Foreign Ministers of Great Britain, France, and Italy. Agreed (March 22) to propose to Governments of Constantinople, Angora, and Athens a three months' armistice, to discuss peace negotiations. (Greece accepted, March 23; Porte, April 1; Angora, conditionally, April 5.) Agreements for solution of controversy also reached. (*T.*, 28.3.22, p. 11.)

See also *Genoa Conference*, *Transcaucasia*.

Ukraine. See *Esthonia*, *Genoa Conference*, *Italy*, *Latvia*, *Poland*, *Russia*, *Turkey*.

United States.

1921, Oct. 9. Bill passed in Senate exempting American coastwise vessels from payment of Panama Canal tolls.

1922, Jan. 21. Extradition Treaty with Costa Rica, signed at San José. (*Cong. Rec.*, Feb. 22, 1922, p. 3219.) Ratified by U.S. Senate on Feb. 22, 1922.

Jan. 31. Bill passed by Senate for refunding Allied debts, signed by President, Feb. 2.

March 22. Note sent to Allied Governments on subject of the expenses of the American Army of Occupation on the Rhine. (*T.*, 24.3.22, p. 11.) Lord Curzon replied on April 7, recognising U.S. claim. (*T.*, 11.4.22, p. 14.)

See also *Austria*, *Brazil*, *Bulgaria*, *Cannes Conference*, *Chile*, *China*, *Colombia*, *Genoa Conference*, *Germany*, *Great Britain*, *Hungary*, *Japan*, *Mexico*, *Norway*, and General International Agreements.

Uruguay. See *Great Britain* and General International Agreements.

Venezuela. See *Ecuador*, *Great Britain*, and General International Agreements.

Vilna. See *Poland*.

Washington Conference. (On the Limitation of Armament.)

1921, Nov. 12–Feb. 6, 1922. Conference held; Belgium, China, France, Great Britain, Italy, Japan, Netherlands, Portugal, and United States, represented. The United States Secretary of State, Mr. Hughes, proposed basis of plan of disarmament. (Text of speech, *T.*, 18.11.21, p. 9.) Seven plenary sessions held on Nov. 12, 15, 21, Dec. 10, 1921, and Feb. 1, 4, 6, 1922.

Dec. 10. "Root" Resolutions embodying principles to govern the policy of the Powers in China adopted by the Conference. Further resolutions adopted regarding extraterritoriality in China, China's neutrality in case of war, treaties and agreements regarding China.

Dec. 13. Four Power Treaty between United States, the British Empire, France, and Japan, signed, relating to their insular possessions and insular dominions in the Pacific Ocean. [Cmd. 1627.] Ratified by U.S. Senate on March 24, 1922.

1922, Jan. 9. Resolution adopted by the Committee on the Limitation of Armament acknowledging the impracticability of imposing effective limitations upon aircraft. [Cmd. 1627.]

Feb. 1. Resolutions adopted regarding Foreign Postal Agencies in China, Foreign Armed Forces in China, Foreign-Owned Radio Stations in China, the Open Door, Unification of Railways and Non-Discrimination in Railway Rights, Reduction of China's Military Forces, Filing of Treaties, Agreements and Concessions concerning China. Terms of Shantung agreement between China and Japan announced to the Conference. Mr. Balfour declared that Great Britain was prepared to return Wei-hai-Wei to China.

Feb. 4. Resolutions adopted regarding the Chinese Customs Tariff and the Chinese Eastern Railway. Modification of 1915 Sino-Japanese Treaties and cancellation of Group V of the Twenty-One Demands announced by Japan. Japanese Delegation announced that their Government was prepared to evacuate Siberia in the near future and to restore Saghalien to the Russian people.

Feb. 4. Treaty for the Settlement of outstanding questions relative to Shantung, signed by Japan and China.

Resolution adopted regarding the establishment of a Commission to examine and report on the Laws of War, together with a resolution limiting its jurisdiction. [Cmd. 1627.]

Resolution adopted regarding the establishment of a Board of Reference for Far Eastern questions. [Cmd. 1627.]

Feb. 6. Treaty signed between the United States of America, the British Empire, France, Italy, and Japan for the limitation of Naval Armament. (Ratified by U.S. Senate on March 29, 1922.) [Cmd. 1627.]

Treaty signed between the United States of America, the British Empire, France, Italy, and Japan for the protection of the lives of neutrals and non-combatants at sea in time of war, and to prevent the use in war of noxious gases and chemicals. [Cmd. 1627.]

Treaty signed between the United States of America, the British Empire, France, and Japan, supplementary to the Quadruple Pacific Treaty of Dec. 13, 1921. [Cmd. 1627.]

Treaty signed between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal relating to China. (Ratified by U.S. Senate on March 30, 1922.) [Cmd. 1627.]

Treaty signed between the United States of America, Belgium, the British Empire, China, France, Italy, Japan, the Netherlands, and Portugal relating to the Chinese Customs Tariff. (Ratified by U.S. Senate on March 30, 1922.) [Cmd. 1627.]

White Russia. See *Genoa Conference, Russia.*

GENERAL INTERNATIONAL AGREEMENTS[1]

AFRICA: Liquor Traffic—Convention and Protocol. (St. Germain-en-Laye, Sept. 10, 1919.)

Ratification: Belgium, July 31, 1920.

Ratification deposited: France, July 23, 1921.

— Convention revising General Act of Berlin, Feb. 26, 1885, and General Act and Declaration of Brussels, July 2, 1890. (St. Germain-en-Laye, Sept. 10, 1919.)

Ratification deposited: France, July 23, 1921.

ARMS AND MUNITIONS: Traffic—Convention and Protocol. (St. Germain-en-Laye, Sept. 10, 1919.)

Accessions: Muscat, June 9, 1921; Finland, June 30, 1921.

Ratification deposited: Chile, Aug. 9, 1921.

[1] The place and date of signature are given in brackets.

COMMERCIAL STATISTICS: Convention. (Brussels, Dec. 31, 1913.)
Accession: Austria, Jan. 28, 1922.
COPYRIGHT: Revised Convention. (Berlin, Nov. 13, 1908.)
Accessions: Brazil, Sept. 7, 1921; Bulgaria, Dec. 5, 1921.
— — Additional Protocol. (Berne, March 20, 1914.)
Accessions: Brazil, Sept. 7, 1921; Bulgaria, Dec. 5, 1921.
Ratification: Belgium, Nov. 4, 1921.
Ratification deposited: Liberia, Sept. 9, 1921.
CUSTOMS TARIFFS: Publication—Convention. (Brussels, July 5, 1890.)
Accessions: Finland, Sept. 7, 1921; Esthonia, Oct. 18, 1921.
Notification that Convention is binding: Austria, Dec. 7, 1921.
FREEDOM OF TRANSIT—Convention. (Barcelona, April 20, 1921.)
Ratification: Albania, Oct. 8, 1921.
HOSPITAL SHIPS—Convention. (The Hague, Dec. 21, 1904.)
Accessions: Danzig, Oct. 31, 1921; Poland, Oct. 31, 1921.
INDUSTRIAL PROPERTY: Protection. (Paris, March 20, 1883; Revisions: Brussels, Dec. 14, 1900; Washington, June 2, 1911.)
Accession: Czecho-Slovakia.
Ratification: Cuba, June 1, 1921.
— — Revised Convention. (Washington, June 2, 1911.)
Accessions: Bulgaria, June 13, 1921; Finland, Sept. 20, 1921; Danzig, Nov. 21, 1921.
— — False Indications of Origin of Goods—Agreement. (Washington, June 2, 1911.)
Accessions: Cuba, June 1, 1921; Czecho-Slovakia, Sept. 30, 1921.
— — Rights affected by World War—Agreement. (Berne, June 30, 1920.)
Accession: Danzig, Nov. 21, 1921.
Ratification: Portugal, Aug. 24, 1921.
LABOUR: Employment of Children at Sea—Convention. (Genoa, July 9, 1920.)
Adhesion: Switzerland.
Ratifications: Great Britain, July 5, 1921; Sweden, Sept. 12, 1921.
— Employment of Children in Industries—Convention. (Washington, Nov. 28, 1919.)
Ratification: Great Britain, July 5, 1921.
— Employment (Finding) for Seamen—Convention. (Genoa, July 10, 1921.)
Ratifications: Sweden, Sept. 12, 1921; Norway, Nov. 16, 1921.
— Night Work of Women—Convention. (Berne, Sept. 26, 1906.)
Accession: Danzig, Aug. 23, 1921.
Notification that Treaty is binding: Austria, July 25, 1921.
— — Convention. (Washington, Nov. 28, 1919.)
Accession: Switzerland.
Ratifications: Great Britain, July 5, 1921; South Africa, Sept. 29, 1921.
— Night Work of Young Persons—Convention. (Washington, Nov. 28, 1919.)
Accession: Switzerland.
Ratification: Great Britain, July 5, 1921.
— Unemployment—Convention. (Washington, Nov. 28, 1919.)
Accession: Switzerland.
Ratifications: Norway, June 13, 1921; Great Britain, July 5, 1921; Sweden, Sept. 12, 1921; Denmark, Sept. 24, 1921; Finland, Oct. 19, 1921.
MARITIME: Assistance and Salvage at Sea—Convention. (Brussels, Sept. 23, 1910.)
Accessions: Danzig, Dec. 1, 1921; Poland, Dec. 1, 1921.
MATCHES: White Phosphorus—Convention. (Berne, Sept. 26, 1906.)
Accessions: Romania, July 21, 1921; Austria, July 25, 1921; Danzig, Aug. 23, 1921; Finland, Oct. 13, 1921; Japan, Oct. 14, 1921.
MERCHANDISE TRANSPORT BY RAILWAY—Convention. (Berne, Oct. 14, 1890.)
Accessions: Austria, July 25, 1921; Poland, Jan. 23, 1922.
MOTOR VEHICLES, INTERNATIONAL CIRCULATION OF—Convention. Signed. (Paris, Oct. 11, 1909.)
Accessions: Danzig, Oct. 18, 1921; Norway, Dec. 19, 1921 (in effect May 1, 1922).
Notification that Treaty is binding: Austria, Aug. 1, 1921.
NAVIGABLE WATERWAYS—Convention and Protocol. (Barcelona, April 20, 1921.)
Ratification: Albania, Oct. 8, 1921.
OBSCENE PUBLICATIONS: Repression—Convention. (Paris, May 4, 1910.)
Accessions: Curaçao and Surinam (Dutch West Indies), Jan. 25, 1922.

OPIUM CONVENTION—Second Protocol. (The Hague, Jan. 23, 1912.)
Accession: Iceland.
PHARMACOPŒIAL FORMULAS FOR DRUGS—Convention. (Brussels, Nov. 29, 1906.)
Notification that Convention is binding: Austria, Dec. 7, 1921.
PHYLLOXERIC CONVENTION. (Berne, Nov. 3, 1881; Supplement, Berne, April 15, 1889.)
Accession: Austria, July 25, 1921.
POSTAL: Letters, etc., of Declared Value—Convention. (Rome, May 26, 1906.)
Accessions: Danzig; Serb-Croat-Slovene State.
— — Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: China, Oct. 12, 1921; Newfoundland, Nov. 15, 1921; Czecho-Slovakia, Nov. 23, 1921; Finland, Dec. 21, 1921; Egypt, Dec. 24, 1921; Switzerland, Dec. 27, 1921.
— Money Orders—Convention. (Rome, May 26, 1906.)
Accessions: Danzig; Serb-Croat-Slovene State.
— — Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: Siam, Aug. 19, 1921; China, Oct. 12, 1921; Czecho-Slovakia, Nov. 23, 1921; Finland, Dec. 21, 1921; Egypt, Dec. 24, 1921; Switzerland, Dec. 27, 1921.
— Parcel Post—Convention. (Rome, May 26, 1906.)
Accessions: Danzig; Serb-Croat-Slovene State.
— — Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: Siam, Aug. 19, 1921; China, Oct. 12, 1921; Czecho-Slovakia, Nov. 23, 1921; Finland, Dec. 21, 1921; Egypt, Dec. 24, 1921; Switzerland, Dec. 27, 1921.
— Postal Subscriptions to Newspapers—Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: Czecho-Slovakia, Nov. 23, 1921; Finland, Dec. 21, 1921; Egypt, Dec. 24, 1921; Switzerland, Dec. 27, 1921.
— Postal Transfers—Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: Czecho-Slovakia, Nov. 23, 1921; Switzerland, Dec. 27, 1921.
— *Service des Recouvrements*—Convention. (Rome, May 26, 1906).
Accessions: Danzig; Serb-Croat-Slovene State.
— — Convention. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: China, Oct. 12, 1921; Czecho-Slovakia, Nov. 23, 1921; Egypt, Dec. 24, 1921; Switzerland, Dec. 27, 1921.
— Telegraph—Convention. (St. Petersburg, July 22, 1875.)
Accessions: China, Aug. 31, 1921; Latvia, Dec. 11, 1921; Austria, Dec. 17, 1921; Cyrenaica and Tripoli (Italian Colonies); Danzig; Lithuania.
— — Supplement. (Lisbon, June 11, 1908.)
Accession: Lithuania.
— — Revised Radio-Telegraph Convention. (London, July 5, 1912.)
Accessions: Venezuela, June 16, 1921; Danzig, June 22, 1921; New Hebrides, Sept. 8, 1921; Austria, Oct. 19, 1921.
— Universal Postal Convention. (Madrid, Nov. 13, 1920.)
Ratifications: San Salvador, Aug. 8, 1921; All Signatories, Dec. 1, 1921.
Promulgation: Spain, Nov. 19, 1921.
— — Union. (Rome, May 26, 1906.)
Accessions: Danzig, Aug. 22, 1921; Lithuania, Aug. 29, 1921; Serb-Croat-Slovene State.
— — Revision. (Madrid, Nov. 30, 1920.)
Accessions: Lithuania, Dec. 29, 1921; Danzig.
Ratifications: Siam, Aug. 19, 1921; China, Oct. 12. 1921; Basutoland and Bechuanaland, Nov. 8, 1921; South Rhodesia, Nov. 8, 1921; Newfoundland, Nov. 15, 1921; Czecho-Slovakia, Nov. 23, 1921; Finland, Dec. 21, 1921; Egypt, Dec. 24, 1921.
PROTECTION OF BIRDS USEFUL TO AGRICULTURE. (Paris, March 19, 1902.)
Notification that Treaty is binding: Austria, Aug. 1, 1921.
PUBLIC HEALTH OFFICE. (Rome, Dec. 9, 1907.)
Accession: Romania.

RED CROSS—Revised Convention. (Geneva, July 6, 1906.)
Accessions: Lithuania, Aug. 20, 1921; Danzig, Oct. 6, 1921.
REFRIGERATION, INTERNATIONAL INSTITUTE OF. (Paris, June 21, 1920.)
Ratifications: Poland, Oct. 28, 1921; Sweden, Dec. 21, 1921; Belgium; Italy; Monaco; Norway; Serb-Croat-Slovene State.
Ratification deposited: Belgium, Oct. 17, 1921; Norway, Oct. 17, 1921.
RIGHT TO A FLAG OF STATES HAVING NO SEACOAST—Declaration. (Barcelona, April 20, 1921.)
Ratification: Albania, Oct. 8, 1921.
SANITARY—Revised Convention. (Paris, Jan. 17, 1912.)
Ratifications: Uruguay, July 18, 1921; Brazil, Oct. 12, 1921; Guatemala, Nov. 10, 1921; Haiti.
Denunciation by United States of Convention of Dec. 3, 1903, came into effect April 22, 1922.
SUBMARINE CABLES—Convention. (Paris, March 14, 1884. Declarations, Dec. 1, 1887. Protocol, July 7, 1887.)
Notification that Treaty is binding: Austria, Dec. 3, 1921
TRADE-MARKS REGISTRATION—Convention. (Madrid, April 14, 1891. Revision, Washington, June 2, 1911.)
Accession: Czecho-Slovakia, Aug. 16, 1921.
Ratification: Cuba, June 1, 1921.
WEIGHTS AND MEASURES—Convention. (Paris, May 20, 1875.)
Promulgation: Austria, Aug. 1, 1921.
WHITE SLAVE TRAFFIC—Agreement. (Paris, May 18, 1904.)
Accession: Bulgaria, June 15, 1921.
— — Convention. (Paris, May 4, 1910.)
Accessions: Bulgaria, June 15, 1921; Uruguay, June 30, 1921; Monaco (principality), July 2, 1921; Danzig, Aug. 22, 1921.
— — TRADE—Convention. (Geneva, Sept. 30, 1921.)
Signatures (to June 1, 1922): Albania, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Esthonia, Great Britain, Greece, Italy, Japan, Latvia, Lithuania, Netherlands, New Zealand, Norway, Persia, Poland, Portugal, Romania, Siam, South Africa, Switzerland.

REVIEWS OF BOOKS

International Law Chiefly as Interpreted and Applied by the United States. By Charles Cheney Hyde. 2 vols. Vol. I. pp. lix., 832. Vol. II. pp. xxvii., 925. 1922. Boston: Little, Brown & Co. ($ 25.)

This is a noteworthy addition to the literature of international law. It is an attempt primarily to portray what the United States through the agencies of its executive, legislative and judicial departments has deemed to be the law of nations. The author does not, however, suggest that there exists an American international law as distinct from that which necessarily prevails throughout the Society of civilised States.

The book is not a mere résumé of the monumental work of Professor J. B. Moore, though it owes, as every book on the subject must owe, much to his labours. Professor Hyde is an independent thinker and worker, and exercises a well-balanced judgment on the topics which he discusses. His work bears out the intention expressed in the preface: "there has been a constant endeavour to emphasise the unreasonableness of any rule which however widely accepted, and although acquiesced in by American Statesmen, has appeared through its operation to violate the requirements of international justice."

The progress of international law will be greatly assisted if the example of the author is followed by writers in other countries publishing a considered statement of the views of their states on the various topics of an international legal nature with which they have been concerned. It is increasingly evident that a fuller knowledge of international law is necessary for the ordinary legal practitioner, and Professor Hyde has set a good example of how this may be made accessible.

The constant references to the recognised authorities not only in America, but also in this country and in the Continent of Europe, testify to the great field of learning which is at the author's command. A striking feature of the first volume is the evidence of the important part which economic questions play in international law; this appears especially in the section headed "The exercise by a state of certain rights as Sovereign within its own domains," wherein the author treats of the control of property, alien ownership of land, the practice of the learned professions, taxation of foreigners and grants of concessions. The lengthy exposition of the subject of passports, which unfortunately has become of pressing importance to-day, is of general interest, though the author is primarily concerned with American passports (Sec. 399). The chapters on Diplomatic Intercourse and Consuls also contain important matter.

The second volume deals with Agreements between States, Peaceful Settlements of Disputes, War and Neutrality. The United States war legislation is dealt with in some detail, and there are full discussions of the topics which have been prominent in the late war such as Defensively-armed Merchant Ships,

Search in Port, Submarine Mines, War Zones, Submarine Vessels, Contraband and Blockade. We find ourselves in disagreement with the author's views on the defensively-armed merchant ship, and in particular with the statement that " The equipment of a belligerent merchant marine for hostile service, even though designed to be defensive rather than offensive, seems on principle, to deprive the armed vessels of the right to claim immunity from attack without warning " (Sec. 743). Historically and legally this position, which is contrary to that taken up by the United States in the Memorandum of March 25, 1916, is unsound (see also Sec. 759). On the subject of search in port, the correspondence between Great Britain and the United States is summarised; the author, while admitting that latitude is to be accorded to a belligerent in attempting to check traffic in contraband, considers that the procedure of forcing innocent merchant ships to deviate from their course for the purpose of search is at variance with the demands of justice, though he admits that the old methods are impracticable. He advocates neutral governmental certification of ship papers, in order to avoid delay. The methods adopted by Great Britain for this purpose during the late war are not as fully set forth as they might have been. As regards mines and war zones, the author considers that on general principles, the laying of mines on the high seas, and the use of floating mines is inadmissible, but under the circumstances of the late war, he holds that the North Sea Barrage, in the laying of which American forces co-operated with the British, was justified by the nature of the service of the vessels and the effect upon the duration of the war. As regards war zones, Professor Hyde challenges the general principle of the attempt to exclude neutral shipping from an area of the high seas, but he makes the pregnant observation that if the belligerent can prove that its interference with the neutral is inconsequential in comparison with the advantage to itself necessarily connected with the defence of its territory, the safety of which is otherwise jeopardised, the excuse is entitled to respectful consideration (p. 424). He further points out that a particular area or zone may be said to possess an essentially defensive character, regardless of its detachment from the territory of the belligerent maintaining it, if it serves, for example, as an indispensable means of frustrating the operations of submarine craft lawlessly undertaken and ruthlessly effective. In such case, the defence of the national fleet of public or private vessels, rather than of territory, against illegal use of a special instrumentality may, under the extraordinary circumstances arising, be deemed to excuse the measure.

Lord Sumner, in *The Stigstad*, pointed out that neutrality must accept some abatement of the full benefits of peace in order that belligerents may not be thwarted in defence of the right of security and independence, the most precious of all the rights of nations; and Professor Hyde's views are not dissimilar. His account of the controversy between Great Britain and the United States in 1915–16 on the subject of the " Blockade " of Germany leads him to put this question : " Does it follow that non-contraband neutral cargoes may be seized when bound for neutral ports, if further transportation by land or sea to the territory of the belligerent whose coast is blockaded is in reality sought to be effected ? " and he replies : " It is believed to be difficult to find a convincing negative answer, although it may be maintained with assurance that maritime states have not yielded so broad a right " (p. 668). However, the author justifies the opposition of the United States to interference with non-contraband

and innocent traffic bound for neutral territory in proximity to that under blockade, and he submits that the solution of the problem as to the limits of the right of blockade depends on the solution of the unsettled problems connected with contraband. In order to protect legitimate neutral trade in non-contraband articles with neutral territory contiguous to a blockaded territory, it is said that there is need of definite prohibition of measures either capable of operating as a blockade of neutral territory, or serving to enlarge the right of capture. The rationing of neutral states is not discussed.

We cannot take leave of this book without tendering to Professor Hyde our congratulations on the production of a work which, within its scope (the participation of the United States in world affairs), will take rank as of first importance.

A. Pearce Higgins.

The Leipzig Trials. An Account of the War Criminals' Trials and a Study of German Mentality. By Claud Mullins. With an Introduction by Sir Ernest Pollock. 1921. London: Witherby. 8vo. pp. 238. (8*s.* 6*d.* net.)

To anyone who has taken even the smallest share in investigating the crimes committed by the Germans against the laws and customs of war or the dictates of humanity or who knows anything of the real nature and extent of such crimes, the action of the Government which ended in the Leipzig trials, and the results of those trials, must have been disappointing. They seemed trivial in comparison with the extent of the wrongs done. The labour spent in investigations seemed to have been almost thrown away, and there is a natural disinclination to examine the question further. As Mr. Mullins says, "Reports of the greatest legal interest were drawn up, but unfortunately they are at the time of writing still secret State documents." A perusal of his book will to some extent relieve this feeling, and certainly the statement often made and repeated by those who have never taken the trouble to ascertain the facts or form a just estimate, that the trials were a "travesty of justice" and a "farce," is completely refuted by Mr. Mullins. He has full personal knowledge of what actually occurred at Leipzig, states the facts carefully and brings an absolutely fair and judicial mind to the consideration of them.

Though his book was written, as he says, for the general public, it is a real contribution to knowledge and will be a help to those who will hereafter be engaged in the development of international law. It does not attempt the solution of the difficult problems which have arisen, and will again arise before international law can become really effective, but it does state clearly and fairly facts which throw light on those problems and which must be considered in dealing with them. Above all, the spirit in which it is written is a model to all those who write or speak on the conduct either of this country and the Allies or of the enemy during and since the war. In some quarters we see prevalent the detestable desire to put the worst possible construction on every act of our own country and to overlook and try to palliate every crime committed by the enemy. On the other hand, there are many—especially among those who did not fight and who suffered least in the war—who will not believe any fact creditable to our late enemies, and by whom it is considered the height of patriotism to refuse to be just to those with whom we have been at war. Mr. Mullins is free from both these

faults. After a careful statement of the facts relating to the trials he amply justifies his opinion that really valuable results have accrued from them. It is true that if the only question involved had been to secure adequate punishment of the guilty, and especially of those who were mainly responsible for the wrongs done, it is impossible to say that the object of the preliminary inquiries and of the trials has been achieved. The results seem ludicrous when compared with the language used at the end of 1918 about bringing the offenders, even "the arch-criminal" himself, to justice. It is also true that the judgments given do not furnish any clear or valuable answer to the legal questions involved—such, for example, as the effect of "superior orders" as an excuse for wrong-doing. Indeed, as Mr. Mullins says, "it could scarcely be expected that the Court at Leipzig would lay down principles which could be generally accepted" on the important practical points of international law which arose in the course of the trials. The problem of punishing crimes committed in the conduct of war has yet to be solved. Nevertheless, any impartial person who wishes to see crime punished by regular methods and proper legal procedure instead of by the free play of the "wild justice of revenge," will agree that the War Trials "did produce results of great political and ethical value both at the time and for posterity." In the first place it was made clear that a purely German court under very great difficulties would conduct a trial fairly, would give due weight to the evidence of witnesses put forward by their late enemies, would reject the doctrine that supposed advantage in the conduct of war would justify any crime. Five out of the six persons arraigned by the British authorities were found guilty and punished. Many of the statements made and views propounded by the defence were emphatically repudiated. To the mind of militant Germany it was a shock to find a German court condemning in strong terms and punishing, however lightly, acts which German naval and military authorities regarded as justifiable and even commendable.

Secondly, the manner in which the cases were presented at the instance of the British authorities, the conduct of the British representatives at Leipzig, and above all the behaviour of the British witnesses, especially those coming from the ranks, won the unfeigned respect of all decent Germans and were "an example to the whole nation" at home. These men who had suffered so much were recognised by the tribunal as careful not to overstate the case against those who had injured them. Our country may well be proud of the Englishmen who were concerned in the Leipzig trials.

ALFRED HOPKINSON.

A Revision of the Peace Treaty. By John Maynard Keynes. 1922. London: Macmillan & Co. pp. 223. (*7s. 6d.*)

With the political argument of this book international lawyers have no concern. But one point of considerable legal interest is dealt with by Mr. Keynes, who questions the validity, from the standpoint of international law, of the occupations of German territory by the French Government. The first actual occupation was in March 1920, when, in the course of dealing with the Kapp Rebellion, the German Government moved more troops into the Ruhr district than the Treaty of Versailles permitted. France occupied Frankfort and

Darmstadt. Again, in April 1921 the French occupied Ruhrort and Düsseldorf upon the ground that Germany had failed to accept the Decisions of Paris in regard to reparations. The question thus arises whether, after the conclusion of peace, one of the parties to the Treaty is entitled to invade the territory of its late opponent for alleged breaches of the Treaty. The answer must surely be in general No, unless the particular instrument the breach of which is relied upon confers the necessary power. Such would appear to be the view of Oppenheim.[1] It would be of interest to know to what Articles of the Treaty of Versailles the French Government would be disposed to point in support of its contention. The case of a breach of reparation provisions is on a somewhat stronger footing than that of any other breach; for this is expressly provided for, while as to the rest the Treaty is silent. Under Part VIII. Sec. I. Annex II. paragraphs 17 and 18, it is a condition precedent to action being taken against Germany for default of the reparation provisions that the Reparations Commission shall give notice to the interested Powers and recommend action. This was not done. Paragraph 18 goes on to set out the Sanctions which may be applied in such an event and they (which Germany agrees not to regard as acts of war) may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may deem to be necessary in the circumstances. It is plain, in the opinion of the writer of this note, that " such other measures " means and was always intended to mean measures *ejusdem generis* with the categories enumerated. If invasion had been one of them, it would have been easy enough to say so. Observance of the law, always necessary, is vital in the case of those who have it in their power to break it.

CYRIL M. PICCIOTTO.

Le Droit des Gens et la Guerre de 1914–1918. Par A. Mérignhac et E. Lémonon, avec une Préface de M. Léon Bourgeois. 2 vols. pp. 650 and 673. 1921. Paris: Recueil Sirey.

This work of two solid volumes has been written with a purpose. " Il importe d'établir, en vue des responsabilités de l'histoire, le bilan de l'excès et crimes de toute sorte commis, au mépris des lois internationales, de la morale universelle et du droit commun des peuples civilisés; par les Austro-Allemands et leurs alliés; c'est ce que nous allons essayer de faire dans les pages qui vont suivre " (Vol. I. p. 41). In great detail the transgressions are reviewed of the Central Powers during the Great War against the Law of Nations, as established by certain International Treaties, such as the Declaration of Paris of April 16, 1856, on International Maritime Law, the Declarations of St. Petersburg of 1868 and Brussels of 1874, the so-called " Peace " Conferences at the Hague of 1899 and 1907; the Genoa Conference of 1906 and the Declaration of London of February 26, 1909.

The authors have not spared themselves any trouble in sifting and arranging the mass of information at their disposal, which has been systematically grouped. The Introduction deals with the causes and declarations of war and the first acts of war on the part of the Central Powers. Vol. I. in five chapters deals with the war on land, viz. 1. the army forces, in which the authors refute the

[1] See *International Law* (3rd ed.), Vol. II. pp. 372–3.

allegations of the use of *francs-tireurs* on the part of Belgium and defend the use of black troops by France; 2. the various acts of war and violation of specific conventions like those regarding the use of asphyxiating gases, expanding bullets, poisons, spies and reprisals; 3. the treatment of prisoners, and 4. of the sick and wounded. The fifth chapter deals with the territories occupied by the armies of the Central Powers, in the first place Belgium; and the treatment meted out to the inhabitants of those territories. The last thirty pages deal with the war in the air.

The war at sea, which is considered in the second volume, involves questions regarding auxiliary cruisers, submarine warfare, bombardment of undefended places on the coast, mines, blockade, the sinking of merchant vessels, hospital ships and fishing smacks. This volume ends with a chapter regarding the punishments of the conquered, the justness of the sanctions and reparations as laid down in the various peace treaties, the League of Nations and the future of international law.

There is little new in the facts revealed in these two volumes, but they are grouped together so as to expose those acts committed by the opponents of the Allied forces in their conduct of the great war as may be called war crimes, that is to say, "violations of existing treaties, general morality and the common law of civilised nations." As a general philosophical study of the causes of the war and the problems which it raised, the contents are disappointing.

A work of this kind seldom satisfies either the mind of the historian or that of the lawyer. It seems hardly time yet calmly and critically to sift the material at our disposal and to write a dispassionate history of the war and its problems. Mérignhac and his collaborator intended to be impartial, but, in order to fulfil the task which they had set themselves, they viewed all facts from one standpoint only, viz. were the violations of existing treaties violations committed by the enemies of France? Such method tends to bias. To take, for instance, the occupation of Belgium by the German troops and its subsequent administration. The Germans, no doubt, were hard task-masters; but, on the other hand, we are not informed of the difficulties which the occupier had to solve, the dangers which his army ran and the extraordinary administrative capacities which he displayed as appears from the volumes edited by Huberich and Nicol Speyer. Nothing is said of the destruction of Eastern Prussia by the Russian troops in 1915.

In combating the causes of excessive human suffering by war operations a clear line should be drawn between (1) sufferings caused in, and as a result of, those operations and (2) the sufferings of those who are placed "hors de combat." Unless we are prepared to take full responsibility for all consequences of war methods, mostly dictated by reasons of self-defence, the sufferings as a consequence of those methods will only disappear with the disappearance of war itself.

The Germans violated the canons of international law by their invasion of Belgium, by their minefields and submarine warfare, their treatment of the civil population in enemy country, of prisoners, sick and wounded, and of enemy property both real and personal.

Consideration of these violations no doubt gives rise to the wish that an International Criminal Court were in existence like the Permanent Court of International Justice at the Hague, in order to mete out justice to those who

ordered or committed acts of senseless and purposeless brutality during the war.

But, from the standpoint of an international lawyer, what is to be said about the blockade by the Allies and the various reprisals?

Similar one-sidedness characterises the treatment of all questions relating to neutrality. The observation of neutrality, if combined with a non-hostile attitude towards Germany, stands condemned in the eyes of the authors.

Nothing is said of the grave offences committed against neutrality or the problems raised thereby, *e.g.* whether in wars which involve the mobilisation of whole nations neutrality has still a *raison d'être*, and if so, on what basis and how to be enforced?

The authors overlooked the fact that the European war revealed the incongruity of the Second " Peace " Conference and the impossibility of in a legal sense regulating warfare.

Mérignhac, however, did not write from a scientific or purely historic standpoint. His object is to justify the Treaty of Versailles and Bourgeois in the Preface fully endorses this view.

The object of the book is political; it is hardly a piece of legal research.

W. R. Bisschop.

Le droit pénal international et sa mise en œuvre en temps de paix et en temps de guerre, par Maurice Travers. Tomes ii. and iii. 1921. Paris: Libr. de la Soc. du Recueil Sirey. 8vo. pp. 683 and 552.

The general scheme of this most important and interesting work has been explained in the 1921–22 issue of this Year Book.[1] The second volume deals mainly with certain exceptional grounds of exemption and of jurisdiction in Criminal Matters recognised or provided for by international usage or by international Treaties.

Among these the exemptions accorded to Consuls and to Diplomatic Agents in the countries in which they exercise their functions occupy a prominent space.

The fact that most of the Treaties dealing with this matter contain a " most favoured National " Clause, and that other Treaties containing a general most favoured Nation Clause are construed as implying the most extensive immunity granted to Consular officials by any international Treaty, adds another complexity to this subject.

Another complication was added by Article 291 of the Treaty of Peace with Germany and the corresponding clause of the Treaties with Austria and Bulgaria, by which the Power concerned undertakes to secure to the " officials and nationals " of the Allied and Associated Powers the rights and advantages of any kind which the Power concerned may have granted by any Treaty to the Officials and Nationals of any of the Powers mentioned in that behalf in the said Article. Mr. Travers is a skilful guide through this labyrinth, and he shows that guidance in the light of definite principle is necessary by referring to certain mutually contradictory judgments of the French Courts.

The question as to the extent of the immunity from criminal jurisdiction accorded to diplomatic representatives of foreign countries has given rise to

[1] Vol. II. (1921–22), p. 226.

much discussion. Mr. Travers refutes the opinion held by Calvo and others to the effect that a person entitled to the said immunity may have to submit to the measures for the preliminary investigation as to the authorship of an offence in the commission of which he has been suspected to have taken part.

According to Mr. Travers, it is impossible from a lawyer's point of view to admit that a tribunal which is deprived of the power of adjudication as regards a particular person suspected of a criminal offence should have a power of investigation as regards such person.

The question as to the circle of persons to which the immunity accorded to diplomatic agents extends is dealt with in great detail.

Another important subject dealt with relates to the application of the rules of criminal law in districts occupied by the armed forces of an Enemy Power. It has been contended that Article 43 of the Hague Convention concerning the laws and customs of war on land which recognises the " de facto " sovereignty of the invading Power deprives the Courts of the invaded district of their jurisdiction in criminal matters, but, as shown by the author, and confirmed by numerous decisions of French and Belgian Courts, the said Article while recognising as valid the exercise of certain rights of sovereignty on the part of the invading Power is not in any way intended to imply that the existing laws and jurisdictions are thereby abrogated. The French Courts have continued to administer German law in the districts of Alsace-Lorraine occupied by German troops.

The third volume which deals with the practical application of the rules explained in the two first volumes is as interesting and rich in information as these.

The fourth volume will be reviewed in the next number of this journal. It is to be hoped that the concluding volume, which has not yet appeared, will contain a full alphabetical index.

The perusal of the three first volumes, while filling the reader with admiration for the author's extensive learning and critical acumen and his power of lucid expression, leaves the impression that the majority of matters discussed by him are not as yet regulated by any rules which can be recognised as internationally binding. If, as may be hoped, the important branch of International Law which forms the subject of the book were to become the subject of international arrangement the study of Mr. Travers' work would be an indispensable preliminary step.

ERNEST J. SCHUSTER.

International Law. A Treatise. By L. Oppenheim. Third Edition, by Ronald F. Roxburgh. Vol. II. " War and Neutrality." 8vo. pp. xlv + 671. 1921. London: Longmans, Green & Co. (36*s.* net.)

The second and concluding volume of the third edition of Professor Oppenheim's well-known treatise is on that part of international law which was chiefly in question during the war. Hence it has involved more extensive revision than the previous one which was noticed in the Year Book last year. It will be seen that the temptation to overload it with details of the events of the war has been happily avoided; for these the reader is generally referred to

Professor Garner's work, *International Law and the World War*, which Professor Oppenheim had himself read in manuscript and highly approved. It is assumed in the book that the law of war is not put an end to by belligerents disregarding it, as they are declared to have done in frequent and flagrant instances during the two Balkan wars of 1912 and 1913 and especially in the world war; nor are its rules as distinct from mere usages, in the author's opinion, to be set aside by belligerents on the plea of necessity, unless they are distinctly made in such a way as not to apply in cases of self-preservation.

Whether the terms of the law of war, as expressed in the Hague Conventions, were directly binding on the belligerents in the late war, not all of them being parties to them, is another matter; the author is inclined to the opinion that strictly speaking they were not. What he thinks the experience of the war clearly demonstrates is "that new means must be found to compel belligerents to conduct war within the limits which the law prescribes." The chief existing one of reprisals he looks on as unsatisfactory in itself and easily leading to the greatest abuse. It is only, he says, "by making it the duty of the League of Nations to exercise intervention in case a belligerent violates the rules that such violations can be prevented." At present, he holds, though neutrals have a right to intervene in such cases they are under no duty to do so. At the same time he points out that the institution of neutrality has now entered into a new phase, since by Article 16 of the Covenant all members of the League are in wars which it conducts to be regarded as belligerents,[1] so that neutrality can only arise in wars outside it.

It was chiefly the use of submarines, mines and aircraft in the late war that made the application of the law of war and neutrality so difficult. Professor Oppenheim does not appear to admit that any of its principles or rules are on this account obsolete, though they may have been thereby extended. The Declaration of Paris is treated in the text as standing law. The rules of blockade are set out as they were when the Declaration of London tried to codify them. But new sections have been added by the editor on "The so-called Long Distance Blockade." We are, however, unfortunately left without the author's opinion on this new method of warfare, nor has the editor given us his own. A rough note in the author's manuscript is said to show that he intended to recognise its legality subject to certain conditions, though he had not decided whether to adopt the British or the American view with regard to the so-called blockade of neutral ports. It is also to be regretted that the author had not time to express his views in detail on the German practice of submarine warfare. He had intended, we are told, to discuss and condemn it, but his manuscript does not indicate the precise form which his arguments would have taken. The rules of visitation and search, however, are not qualified in the text in any way. Our author declares that it was perfectly legitimate for merchantmen of the Allies to attempt in self-defence to ram German submarines, even if signalled to stop and submit to visitation, and that the conviction and execution of Captain Fryatt was "nothing else than a judicial murder." There are other subjects such as that of the legality of mines and minefields on which the fully developed opinion of the author would have added to the value of the work,

[1] Switzerland, remaining permanently neutral, seems to be an exception to the principle.

but generally speaking the new edition of this highly authoritative text-book has been brought out in the form which Professor Oppenheim would have given it if he were alive—a result for which we are indebted to Mr. Roxburgh, who has carefully and faithfully adapted the manuscript of the deceased author to the text and added excellent work of his own, where it was absolutely required.

E. A. Whittuck.

The Law of Naval Warfare. By J. A. Hall. 2nd Ed. 1921. London: Chapman & Hall. pp. viii + 398. (30*s.* net.)

The first edition of Mr. Hall's book appeared about six months before the outbreak of the war, and was stated to have been written primarily in the hope that it might prove of service to naval officers. Both the utility of the book for this purpose and the rules of war with which it dealt were put to the test sooner than the author probably expected. The fact that a second edition has been called for indicates that the book has been found to serve its purpose, and as the new edition was referred to in the course of the Washington Conference as "an authority which the British Admiralty could not dispute" it may be said to have taken its place among the recognised text-books on the subject.

The second edition has grown from 160 pages to 400. This increase was to a large extent doubtless unavoidable in view of the amount of new material provided by the events of the war, but it may perhaps be doubted whether a considerable increase in the size of a book of this sort may not involve some diminution in its utility from the point of view of the naval officer when dealing with the practical problems which present themselves to him. The introductory chapter, for instance, contains a good deal of material which does not seem likely to be of much practical use to the naval officer, who may be assumed to receive instructions from the Admiralty as regards such questions as the recognition of belligerent rights in particular cases of rebellion or civil war. Nor is the naval officer who has to carry out measures based on the principle of retaliation likely to be much concerned with the principles on which retaliation can be justified. It is, however, obviously difficult to construct a book of this nature which will be equally useful both for purposes of study at leisure and for consultation in actual practice, and Mr. Hall's book, which is the latest and most complete English work on the subject, and which, in addition to dealing fully with the law of naval warfare under the usual headings, contains a sufficiently complete account of the special action taken by the Allies to cut off the sea-borne commerce of Germany, should possess considerable value for students of international law as well as for the class for which it is primarily intended.

Intervention in International Law. By Ellery C. Stowell. 1921. Washington: John Byrne & Co. 8vo. pp. 558.

The purpose of this work is "to set forth the occasions when a state is justified in employing force or the menace of force to influence the conduct of another state," and intervention is defined as "the rightful use of force or the

reliance thereon to constrain obedience to international law." The book, therefore, is by no means confined to intervention as thus described, and unless an unusual meaning is to be attached to " force," several subjects are also included which are foreign to the author's purpose, and certainly to intervention. Among them are the diplomatic ostracism of Servia for the murder of the king and queen in 1903, the granting of asylum to fugitive slaves, the liability of the master of a merchant ship for contravention of the Plimsoll load-line, and the refusal of the United States to allow the transport of alcoholic liquors across its territory. Intervention is admittedly a vague term, but the author's conception of it seems to be too wide in one direction and too narrow in another. On the one hand, it is not distinguished from war, and though it may well become war, yet in general the causes of war are not within the province of modern international law, while the causes of internal intervention are.[1] On the other hand, most jurists include in intervention as a term of art the wrongful use of force as well as the rightful use of it, and indeed generally regard intervention as presumptively wrongful. Elsewhere in the book " interposition " and " interference " have been given rather unusual meanings, which the student must not expect to find in the bulk of juristic writings and state papers.

The view stated as to the illegality of the slave trade internationally is too dogmatic. So is that which denies the legality of intervention in pursuance of a treaty right. The jurists who do not accede to this proposition are thrust aside too hastily, or charged with persistent error, or even ignored (*e. g.* Oppenheim); and the right of the United States to intervene in Cuba under the Treaty of 1903 is explained as a mere recognition of the " supervisory capacity of the United States." But what is the difference between this " supervisory capacity " and intervention as it usually is understood? The intervention of Great Britain, France, and Russia in Greece, 1915–1917, might well have been discussed in this connection.

Eighty pages of the book are devoted to an excellent bibliography of one of the most difficult topics in International Law, whereby a great service has been done to future research on the topic. The proof-reading seems to have been rather hurried.

PERCY H. WINFIELD.

A Manual of International Law for the use of Naval Officers. By C. H. Stockton. Second revised edition. 1921. Naval Institute, Annapolis, Md. pp. 355.

The first edition of this Manual for Officers of the United States Navy, written by a retired Rear-Admiral U.S.N., appeared in 1910, a revised edition was issued in 1917, and the present edition is a revision of the latter. The book does not purport to be an original contribution to the literature of international law, but a presentation of sound and authoritative matter; much of it, therefore, consists of quotations from well-known works. It is, however, by no means a " scissors and paste " piece of work, and Admiral Stockton, who has had much experience in the teaching and practical working of the Law of Nations, has brought together in a small compass a great deal of information which all naval officers, as well as students of international law will find

[1] See the reviewer's article in this volume, p. 130.

useful. A few changes have been made in the text of the older edition as a result of the late war, and references to the Instructions issued by the Navy Department in 1917 are inserted. The author has added a Supplementary Chapter of 23 pages, which is exclusively concerned with occurrences during the late war, in which he deals with the following topics :—Cutting of Cables, Radiotelegraphy, Neutrality Laws, Internment of Vessels, Armed Merchantmen, the so-called Blockade of Germany and the Right of Angary. There is little in the way of comment on or criticism of the Allied action as regards contraband or the so-called blockade of Germany. The author states that a legal maritime blockade of Germany was impracticable, but that the Allies made use of their effective control of the sea to stop trade to and from Germany through neutral ports and countries by applying the doctrine of Contraband and Continuous Voyage, supplemented by claims of justifiable retaliation for methods adopted by Germany during the war, and " especially in the North Sea, by the laying of mines aimed against peaceful traders and non-combatant crews, with the avowed object of preventing commodities of all kinds, including food for the civil population, from reaching or leaving Great Britain or the coasts of France." This led to the adoption of a doctrine of ultimate consumption and to the rationing of adjacent neutral countries. It should have been pointed out that though excess of average imports raised a presumption against a given cargo, the presumption was rebuttable.

A. Pearce Higgins.

The " Great War " and International Law. By Elihu Root. Presidential Address at the Fifteenth Annual Meeting of the American Society of International Law, April 27th, 1921. 1921. Washington : American Peace Society. pp. 20.

The lecturer admits that the late war has shown the fallacy of many, almost all, maxims of the Law of Nations as we conceived them before 1914. He warns us against two dangers, viz. firstly, the doctrine of *Kriegsraison* adopted by Germany; secondly, " internationalism " as understood by the Third International of Russia.

In considering the dual character of the Treaty of Versailles—viz. as a Treaty of Peace whose terms must be complied with and as a means of bringing all civilised nations into agreement for the future preservation of peace—Root considers the way in which the development of the law of Nations is to be promoted, firstly through the general work of the League of Nations, secondly by a system of international conferences, and thirdly by the establishment of the Permanent Court of International Justice.

W. R. Bisschop.

The Development of Modern Diplomacy. By James Brown Scott. 1921. Washington : American Peace Society.

This pamphlet reveals a masterly historical handling of the problem of diplomacy, using that term as " the principles of international law applied to the relations of States." The distinguished author takes the Treaty of

Westphalia (1648) as the starting-point of the conception of the modern State. He sketches the history of arbitration lightly but sufficiently, and dwells on the interest of neutrals in the settlement of issues which have been the cause of wars and the recognition of this interest by attendance at the resulting conferences of peace. Better are the conferences during peace to solve difficulties which sooner or later might result in war. Our author then treats of Judicial Settlement, including an adequate reference to the International Court of the Hague established in 1920. The closing section of the pamphlet is concerned with the author's use of the constitution of the United States as illustrating the possibility of numerous independent States confederating for determined purposes.

WYNDHAM A. BEWES.

Diplomacy Old and New. By George Young (Swarthmore International Handbooks). 1921. The Swarthmore Press. pp. 105. (2*s.* 6*d.* net.)

The author of this book, struck by the alleged failures in principle and effect of our modern diplomatic methods, set himself the task of investigating the reasons and of suggesting remedies. He upholds the finding of the Fifth Report of the Civil Service Commissioners (Cd. 7748) which recommends *inter alia* the reconstruction of the Board of Selection, the amalgamation of the Foreign Office and the Diplomatic Service, better conditions of service, promotion and transfer by a departmental body, etc. The author advocates post-graduate training and the creation of a Chair of Foreign Affairs in the University of London in connection with the present Schools of Regional Studies, and a Chair of National Studies. But our recent failures, he thinks, may be chiefly explained by the Foreign Office having deprived the Diplomatic Service of many of its functions, by the Foreign Office being untouched by contact with our home democracy, and by the arbitrary power of subordinate officials. He would remedy this unsatisfactory system, first, by the creation of a Permanent Committee on Foreign Affairs to which the Foreign Secretary should report and which he should consult and which itself would be in communication with representatives of the Dominions; secondly by making all treaties and conventions subject to parliamentary ratification, as was in fact done in the case of the Peace Treaties, and by making the Assembly of the League of Nations representative of the Parliamentary bodies rather than of the Foreign Offices. "Democratic diplomacy is the only true diplomacy of to-day, because it is the only diplomacy that can exploit the moral forces of to-day" (p. 87). The author is no doubt in the right in his main survey of the world of diplomacy, and we commend his thoughtful and well-informed volume to all students of public international affairs.

WYNDHAM A. BEWES.

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[1] Published by the International Labour Office, Geneva.

[2] Published by H.M. Stationery Office, Kingsway, London, W.C. 2. The figures in parentheses indicate the price including postage.

[3] A complete list of these was given in Vol. I (1920–21) of the *British Year Book of International Law*, p. 261.

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